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IN THE

SUPREME COURT OF THE UNITED STATES

****
Misc. No. 75-869
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ROGER LAWRENCE WETMORE,
Petitioner

vs.

THE STATE OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI TO THE
NORTH CAROLINA SUPREME COURT

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The State of North Carolina

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PETITION FOR WRIT OF CERTIORARI TO THE

NORTH CAROLINA SUPREME COURT

****

The petitioner, Roger Lawrence Wetmore respectfully prays that a writ of ceriorari issue to review the judgment of the North Carolina Supreme Court affirming the North Carolina Superior Court Judgment invoking the Death Penalty, the said judgment being dated and entered the 6th day of June, 1975.

OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 287 N. C. 344, and is set out in Appendix A hereto pp 9-18.

JURISDICTION

The judgment of the North Carolina Supreme Court was entered on the 6th day of June, 1975, and for good cause shown the Court extended time to file petition for Writ of Certiorari until November 4, 1975 appendix B hereto pp 19-23. This Court's jurisdiction is invoked under 28 U. S. C. §1257 (3).

QUESTION PRESENTED

Whether the imposition of the death penalty in the State of North Carolina is cruel and unusual punishment in violation of the Eighth Amendment and arbitrary punishment in violation of the Fourteenth Amendment.

STATEMENT OF THE CASE

This is a petition for a Writ of Certiorari to review the judgment of the Supreme Court of North Carolina, entered on June 6, 1975, affirming petitioner's conviction and death sentence. Petitioner Roger Lawrence Wetmore was sentenced to die on August 2, 1974, in Rowan County Superior Court upon conviction of first degree murder.

The deceased was the father of the defendant. The killing took place around midnight on February 8, 1974, at the home of the deceased and the defendant.

The State put on evidence including testimony of the deceased's wife who was the mother of the defendant. The defendant then took the stand on his own behalf and the defendant also placed Dr. Robert Rollins on the stand who testified that in his opinion at the time the crime was committed the defendant did not know right from wrong. He based this upon the defendant's belief that killing his father was right.

In the early evening of the killing the defendant, his mother and the deceased were eating supper and later watching T. V. The defendant went to his room and later the deceased and his wife went to bed. The defendant lay on his bed for awhile thinking about killing his father. He then went and knocked on the door of his father and mother's room and his father let him in. He told his father to get dressed. They began arguing and defendant knocked him down on the floor and then got a hunting knife. They began fighting again and the defendant stabbed the deceased until he felt he was dead.

The defendant and his mother then dragged the body through the house onto the back porch. The defendant then went to get a pickup truck. They loaded the body on the truck and the defendant stated his mother advised him to cut his head off or the "Golden hairs" would revive him. The defendant then used an axe to cut the head of the deceased off.

The defendant had his mother help him take the body to Kelsey Park in Salisbury so that the authorities would think an inmate from the V. A. Hospital killed him. The defendant threw the axe in the pond and helped his mother clean up the blood in the house. The defendant testified he knew it was against the law to kill his father but did not know it was wrong and thought it was his duty. He did not think it was morally wrong. He testified he tried to cover up the killing so that he could proceed to a base star ship which he never found. The defendant hurt his finger during the fight with his father who bit his finger. The next day he went to a doctor and told him he cut it while sharpening a knife. The defendant testified it was wrong to kill his father and wrong by the Bible but he thought there were reasons that made it right at the time he killed him.

He testified his father was the leader of the star ship base and they were going to cause wars upon the U. S. and that it was right to kill him and stop him. He testified he hated his father but that was not the reason he killed him. The defendant testified that he thought his father was from another planet and that his father was a servant to his mother. He thought his mother was a princess and was not treated like one. He believed his mother had planned on killing his father for years as a publicity stunt. She had planned that her three sons would do it for her. He testified that he was under the control of a machine computer from a star ship base. He testified he believed in life on other planets. He believed his father was in charge of the star ship base on this planet and that he was driven by a machine. The computer put it in his head. The defendant testified he considered Edwin Wetmore, the deceased, to be his stepfather and that his real father was a Richard Stewart whom he worked for in Wilmington. The defendant felt his father was raising him to be a dictator.

The defense used Dr. Robert Rollins, psychiatrist in charge of the Forensic Unit at Dorothea Dix as a witness. He was qualified as a medical expert in the Field of Psychiatry. His testimony revealed that

he had seen Roger personally for less than 60 minutes; however, his staff which he had supervision of had seen the defendant and observed him for a much longer period. Based upon their reports to Dr. Rollins and upon his personal interviews with the defendant, Dr. Rollins gave an opinion as to whether the defendant knew right from wrong at the time he killed his father. In his opinion the defendant was not able to distinguish right from wrong with respect to the murder of his father based upon his assessment that the defendant believed it was right to murder his father, and that he was led to believe this by delusional or false beliefs regarding his father's conspiracies. Dr. Rollins also expressed an opinion that the defendant at the time of the killing knew the nature and quality of his act when the killing occurred.

Dr. Rollins also testified that he had examined Mrs. Dorothy Wetmore, mother of the defendant, when she was sent to Dorothea Dix for observation. It was his assessment that Mrs. Wetmore was suffering from a mental illness known as chronic paranoid schizophrenia (R p 127). He stated that her mental illness was similar to that of the defendant but that the defendant's was acute rather than chronic. Both illnesses were similar in that both of them thought other people were doing harmful things to them and this feeling was toward the husband and father (R p 127).

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner's Assignment of Error Number 2 contended that there was error "(a)s to the imposition of the death penalty in this case being cruel and unusual punishment." R. 165. The Supreme Court of North Carolina rejected this claim; at page 357 the Court said:

> (8) Finally, defendant contends that the entry of a judgment ordering the death penalty violates the constitutional guarantee against cruel and unusual punishment and that the arbitrariness of the imposition of the death penalty deprives him of equal protection of the law guaranteed by the Constitution. Defendant admits that this Court has rejected this argument in State v. Jarrett, 284 N.C. 625, 202 S.E. 2d 721 (1974). We adhere to our decision in that case. Further discussion would serve no useful purpose. See State v. Fowler, 285 N.C. 90, 203 S.E. 2d 803 (1974); State v. Dillard, 285 N.C. 72, 203 S.E. 2d 6 (1974); State v. Crowder,

285 N. C. 42, 203 S. E. 2d 38 (1974); State v. Waddell, 282 N. C. 431, 194 S. E. 2d 19 (1973).

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REASONS FOR GRANTING THE WRIT

I

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF FIRST DEGREE MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

II

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE DEFENDANT IN THIS CASE WAS DENIED DUE PROCESS OF LAW AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES BECAUSE THE DEFENDANT WAS REQUIRED TO PROVE TO THE SATISFACTION OF THE JURY HIS DEFENSE OF INSANITY AND TO REDUCE THE CRIME TO MANSLAUGHTER TO PROVE TO THE JURY NO MALICE RATHER THAN THE STATE PROVING THE NECESSARY ELEMENTS BEYOND A REASONABLE DOUBT.

In order to avoid burdening the Court with lengthy and repetitious matter, petitioner adopts the "Reasons for Granting the Writ" section, of the Petition for Writ of Certiorari to the Supreme Court of North Carolina, Dillard v. North Carolina, 285 N. C. 72, No. 73-6875 (filed June 11, 1974), at 11-51 (attached as Appendix B, infra). On October 29, 1974, this Court granted certiorari in Fowler v. North Carolina, No. 73-7031, to consider a similar question.

As to reason for granting the Writ number two, the petitioner submits the following discussion.

The recent case of Mullaney vs. Wilbur 44 L ED 2d 508 which was decided on June 9, 1975 by the United States Supreme Court has an impact on this case now being filed before the Supreme Court. This case now before the Court was decided by the North Carolina Supreme Court on June 6, 1975. Had the Counsel for the defendant had been able to cite the decision in the Mullaney Supra case in their brief and argument to the N. C. Supreme Court, the petitioner contends that

a different result may have occured.

The petitioner herein does submit that the decision of the Supreme Court in the Mullaney case has a direct bearing on his case and should be considered carefully in determining if a Writ of Certiorari is granted.

The Court held that the due process requirement of the U. S. Constitution requires that the State prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged. Although the Mullaney case deals only with the situation where a defendant charged with murder has the burden of proving that he acted in the heat of passion in order to reduce the severity of the crime, the petitioner contends it applies to the affirmative defense requirements of proof in North Carolina. The law is well settled in North Carolina wherein the burden is placed upon the defendant to prove any defense of insanity that he might have to the satisfaction of the jury; thusby shifting the burden of proof on the defendant rather than requiring the State prosection to prove all elements of the crime. The petitioner contends that the due process provision of the U. S. Constitution requires that the State should prove all elements of the crime and failure to do so violates the due process of the petitioner.

Approximately one half the states in the U. S. along with North Carolina place the burden of proving insanity upon the defendant. However in the other half of the states and in the federal courts, the rule has been that once the defendant raises the issue of his sanity the government must prove his sanity beyond a reasonable doubt. Davis vs. United States 160 U. S. 469 (1895). Admittedly in the case of Leland v. Oregon, 343 U. S. 790 (1952) the Court held that the states need not as a part of the due process follow the Davis rule. However petitioner would point out to the Court that there was a strong dissent by Mr. Justice Frankfurter in the Leland v. Oregon Supra case. Thereafter in the case of In Re Winhip

397 U. S. 358 (1970) the Court in its decision relied somewhat on the dissent in the Leland vs. Oregon case. The Court in the In Re Winship Supra case said:

Mr. Justice Frankfurther stated that it is the duty of the Government to establish guilt beyond a reasonable doubt. This notion basic in our law and rightly one of the boasts of a free society is a requirement and a safeguard of due process of law in the historic procedural content of "due process". Leland vs. Oregon 343 U. S. 990 (1952)

In the case of Mulianey vs. Wilbur 44 L Ed 2d 508 (1975) decided by the Court on June 9, 1975 the Court held that the prosecution is required to prove the existence of every element beyond a reasonable doubt and that the burden does not shift to the defendant and that the burden remains on the State. The Court in it's decision relied heavily on the earlier decision of In Re Winship 397 U S 358 (1970).

The petitioner therefore contends that due process requires that this ruling apply to the affirmative defendant burden placed on defendants in North Carolina who have a defense of insanity. The petitioner in this case was placed in the unfair position of having to prove to the satisfaction of the jury of his insanity. The burden shifted to him. Presently the Federal Courts and over half of the states are functioning well under the rule of continuing the burden of proving all elements of the offense upon the prosectuion. The petitioner contends the ruling in the Mullaney case does make such a ruling and that this is a retroactive ruling and should apply in this case.

The law of the State of North Carolina requires that a person who is charged with the offense of murder in order to reduce this offense to manslaughter, the burden is upon the defendant to prove to the satisfaction of the jury that he acted in the heat of passion caused by provocation.

State vs. Jennings 276 N. C. 157 (1970) and State vs. Merrick 171 N.C. 788, 88 S. E. 501 (1916).

The petitioner in the case before the court contends that under the due process clause of the Fourteenth Admendment of the U. S. Constitution, the State prosecution is required to prove all the elements of murder beyond a reasonable doubt and that the defendant not be required to prove he acted in the heat of passion on sudden provocation in order to reduce the offense to manslaughter. The petitioner further contends that due process requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation. The case of Mullaney vs. Wilbur, supra, supports the position of the petitioner. The court in Mullaney holds that the burden does not shift to the defendant and the burden stays with the prosecution to prove its case beyond a reasonable doubt.

In the present case the court instructed the jury on First Degree Murder, Second Degree and Voluntary Manslaughter. The petitioner contends that this was error and that it was not harmless error. The burden the law of North Carolina placed on the defendant to prove his insanity and to negate valice caused the defendant to have to try his case in a manner that was prejudicial to him. In addition based upon the total evidence in this case the jury (even viewed in the context of the overall charge) could have rendered a verdict of manslaughter if the proper instructions would have been given the jury and the burden not being shifted to the defendant.

CONCLUSION

Based upon the foregoing reasons the petitioner prays that the petition for a Writ of Certiorari be granted.

Respectfully submitted,
DAVIS, FORD & WEINHOLD

By: Robert M. Davis

Robert M. Davis

Larry G. Ford

Larry G. Ford

Attorneys for Petitioner

Appendix A

State v. Wetmore, 287 N.C. 344

After careful review of all assignments, we find no prejudicial error in the trial. The verdict and judgment must therefore be upheld.

No error.

Chief Justice SHARP dissenting as to the death sentence:

The rape for which defendant has been convicted occurred on 5 December 1973, a date during the period between 18 January 1973, the day of the decision in *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19, and 8 April 1974, the day on which the General Assembly rewrote G.S. 14-21 by the enactment of Chapter 1201 of the Session Laws of 1973. For the reasons stated in the dissenting opinion in *State v. Jarrette*, 284 N.C. 625, 666 *et seq.*, 200 S.E. 2d 721, 747 *et seq.* (1974), I dissent as to the death sentence imposed upon defendant by the court below and vote to remand for the imposition of a sentence of life imprisonment.

Justice COPELAND dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in *State v. Williams*, 286 N.C. 422, 437, 212 S.E. 2d 113, 122 (1975).

Justice EXUM dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion in *State v. Williams*, 286 N.C. 422, 439, 212 S.E. 2d 113, 121 (1975).

STATE OF NORTH CAROLINA v. ROGER LAWRENCE WETMORE

No. 47

(Filed 6 June 1975)

1. **Jury § 5— reexamination and challenge of jurors accepted by both sides**

In this homicide prosecution, the trial court did not err in permitting the district attorney to reexamine and challenge for cause a prospective juror and to reexamine and challenge peremptorily a second prospective juror after both had been passed by the State and by defendant but before the jury was impaneled where the court was informed that the first juror had formed an opinion as to defendant's guilt and the juror stated she now believed defendant was not guilty by reason of insanity, and where the second juror had initially indicated he only knew defendant casually, the court was informed the juror was a good friend of defendant and his family, and upon reexamination the juror admitted that defendant and his son were the best of friends and that he knew defendant quite well.

2. **Witnesses § 1— competency of witness**

The competency of a witness to testify is to be determined at the time the witness is called to testify and rests mainly, if not entirely, in the sound discretion of the trial judge in the light of his examination and observation of the particular witness.

3. **Witnesses § 1— competency of State's witness — motion for new trial**

The trial court in a homicide case did not err in failing to grant defendant a new trial because of the incompetency of a State's witness after having heard the witness testify and a psychiatrist testify that the witness was suffering from a mental illness known as chronic paranoid schizophrenia where the testimony of the witness, though long and rambling at times, was clear and consistent on all material matters and was fully corroborated by defendant, the local police, and S.B.I. agents.

4. **Homicide § 31— death from intentional use of deadly weapon — presumptions**

The trial court did not err in instructing the jury that if the State proved beyond a reasonable doubt that defendant intentionally killed the deceased with a deadly weapon when "the law raises two presumptions: first, that the killing was unlawful, and second, that it was done with malice."

5. **Criminal Law § 115; Homicide § 23— instructions — not guilty verdict — insanity — failure of State's proof**

When construed as a whole, the charge of the court in this homicide case did not limit the jury's permissible not guilty verdict to a verdict of "not guilty by reason of insanity" and foreclose the possibility of a verdict of "not guilty" by virtue of possible failings in the State's case.

6. **Criminal Law § 5; Homicide §§ 7, 25— mental disease — effect on premeditation and deliberation — failure to instruct**

The trial court in this first degree murder case did not err in failing to charge that insanity which precludes the mental process of premeditation and deliberation is a defense to a charge of first degree murder and that if as a result of mental defect of reasoning the defendant did not have the required specific intent to kill, defendant should be found not guilty of first degree murder.

7. **Criminal Law § 5— irresistible impulse doctrine**

The irresistible impulse doctrine is not recognized by the courts of this State.

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8. Constitutional Law § 36; Criminal Law § 135; Homicide § 31— death penalty for first degree murder

Imposition of the death penalty for first degree murder did not violate defendant's guarantee against cruel and unusual punishment or deprive him of equal protection of the law.

Chief Justice SHARP concurring in part and dissenting in part.

Justices COPELAND and EXUM dissenting as to death sentence.

APPEAL by defendant from *Peel, J.*, at the July 1974 Term of ROWAN Superior Court.

On indictment proper in form, defendant was convicted of the first degree murder of his father, Edwin Hall Wetmore. Defendant appeals from judgment imposing a sentence of death.

Evidence for the State tends to show: On Friday, 8 February 1974, deceased came home from work at the Veterans Administration Hospital (V.A. Hospital) in Salisbury at about 4:45 p.m. After supper, he and his wife Dorothy read the newspaper and watched television. They went to bed about 9:00 or 9:30 p.m. About 11:30 p.m. they were awakened by defendant's knocks on their locked bedroom door. When the door was opened, defendant entered and told his father to put on his clothes because they were going to the V.A. Hospital. Defendant called his father a "queer" and they began fighting. At first, the two men fought with their fists, but defendant procured a scout knife and stabbed his father "more than once." Mrs. Wetmore saw "a good bit" of blood.

Defendant then compelled his mother to help him drag the body into the kitchen. He then cleaned his scout knife and took it to his room where Mrs. Wetmore had seen it before. He also took the rug which had blood on it out of the bedroom.

Defendant and his mother then loaded the body onto a pickup truck. She went back to the kitchen in a state of shock. While there she heard the sound of metal coming from the back yard but at no time saw an axe. As she was wiping up blood in the kitchen, defendant came in and said he wanted to take the body to the ball park at the V.A. Hospital (Kelsey Park) so it would look like a mental patient had killed his father. He drove the truck to Kelsey Park and left it, returning in a car driven by his mother, who had followed him. Upon returning home, they cleaned the house for an hour or two. Mrs. Wetmore washed defendant's bloodstained shirt, jeans and tennis shoes.

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Defendant removed several bloodstained shingles from the side of the house. He said something to his mother about putting an axe in a pond near the house.

At 5:00 p.m. on Monday, 11 February 1974, defendant and his brother Jerry Wetmore went to the Salisbury Police Department and told Sergeant J. L. Hurley that their father had been missing and that they had located his body in the back of a truck at Kelsey Park. Sergeant Hurley accompanied defendant and Jerry Wetmore to Kelsey Park where he was shown the body of deceased.

At 4:45 a.m. on Tuesday, 12 February 1974, agents of the State Bureau of Investigation searched the Wetmore house with the consent of Mrs. Wetmore and found a boy scout knife with a brownish substance on it in a chest of drawers in defendant's bedroom.

At approximately 8:30 p.m. on Wednesday, 13 February 1974, Mrs. Wetmore, frightened because defendant appeared "extremely nervous," made a statement to agents of the State Bureau of Investigation which was introduced at trial to corroborate her testimony. Agents returned to the Wetmore house at about 2:00 p.m. on Thursday, 14 February 1974, and, again with Mrs. Wetmore's permission, searched the premises. The agents found an axe in a pond about one-half mile from the house and a bedroom rug on a trash pile five to six hundred yards from the house.

Analysis of the scout knife showed the brownish substance to be human blood of indeterminate blood type. Analysis of the head of the axe taken from the pond revealed numerous white and brown Caucasian head hairs. Analysis of reddish brown stains on the bedroom rug showed them to be human blood of blood group O, the blood group of deceased.

Dr. Elizabeth Mayrand performed an autopsy on deceased at 9:30 p.m. on 11 February 1974. The body had 43 stab wounds and the head was almost completely dismembered from the body. Death was caused by numerous stab wounds in the chest.

Evidence for defendant tends to show: Defendant testified that he was not in control of his mental or bodily faculties at the time he killed his father; rather, a computer at a star ship base was in control of them. Defendant felt it was his duty to

kill his father since his father was in control of a star ship base on this planet and was teaching defendant to become a dictator. Due to the computer's influence, defendant did not feel he had a choice when he killed his father. He stated that he stabbed his father many times to be sure he was dead; that he knew it was against the law to kill his father but at the time of the killing did not think it was wrong; that if he had known it was wrong he would not have done it; and that he tried to cover up the killing because he wanted to be able to proceed to a star ship. He also stated that he had planned to kill his father for about one week and decided then how he was going to do it and cover it up. He further testified: "I knew destroying my father was wrong. My mother wanted to leave the body at the house and say it was self defense but I thought it better to take it to Kelsey Park."

Warren Owen, a friend from high school, testified that defendant told him life existed on other planets; that Hickory, North Carolina, was being used as a star ship base; and that defendant and a boy from Myrtle Beach were trainees of these creatures.

David Long, jailer at the Rowan County Sheriff's Department, testified that while defendant was in jail during February 1974 he carried on conversations with imaginary people and showed signs of hallucination.

Dr. Robert L. Rollins, Director of the Forensic Unit at Dorothea Dix Hospital in Raleigh, evaluated defendant at Dorothea Dix during February and March 1974. Dr. Rollins testified that, in his opinion, defendant is above average intelligence, but is suffering from a mental illness known as acute schizophrenic reaction; that at the time he killed his father he was not laboring under such a defect of reason from disease of the mind as to be incapable of knowing the nature and quality of his acts; that he was aware of what he was doing and the harmfulness of his acts to his father; that he meant to kill his father; and that at the time of the killing he did not know right from wrong with respect to the decision to kill his father. Further, in his opinion defendant was not trying to simulate insanity.

Dr. Rollins further testified that in his opinion defendant attempted to cover up this crime for two reasons: First, he appreciated that there were members of the community who did not accept his beliefs about the space conspiracy, and that these

people very likely would apprehend him and put him in jail; and, second, he felt that if this happened he would not be able to carry out his mission to search for this space ship base. Defendant made this elaborate plan to cover up the killing of his father even before he killed him for the same reasons. Dr. Rollins did not believe the defendant would have killed his father if a police officer had been standing there because defendant knew the police officer would consider it wrong.

Dr. Rollins also testified:

> " . . . [I]t was my opinion that Mr. Wetmore . . . was competent to stand trial, using the criteria that he knew what he was charged with, he knew the possible consequences if he were convicted, and I felt he was able to cooperate with his attorney."

Attorney General Rufus L. Edmisten and Assistant Attorney General George W. Boylan for the State.

Robert M. Davis and Larry G. Ford for defendant appellant.

MOORE, Justice.

Defendant first assigns as error the action of the trial judge in permitting the district attorney to reexamine and challenge for cause Mrs. Brady, a prospective juror, and to reexamine and challenge peremptorily Mr. Crisp, another prospective juror, after both had been passed by the district attorney and counsel for defendant.

Before the State passed Mrs. Brady, she stated she had not formed an opinion as to defendant's guilt or innocence. However, before the jury was finally selected and impaneled, the trial court was informed that Mrs. Brady had formed an opinion as to defendant's sanity. On further examination, Mrs. Brady stated she now believed defendant was insane at the time of the homicide and was not guilty of the crime charged by reason of insanity. Over objection, this juror was excused by the State for cause.

Before the State passed Mr. Crisp, he indicated he only knew defendant casually. Before the jury was impaneled, the court was informed that Mr. Crisp was a good friend of defendant and his family. Upon reexamination, this juror admitted

that defendant visited h[illegible]eir home two or three times each week, that defendant and h[illegible]n were the best of friends, and that he knew defendant quite w[illegible]. The State, over objection, then excused Mr. Crisp peremptori[illegible].

In *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), defendant was on trial for murder. The trial judge excused a juror on the grounds of family hardship. The circumstances constituting the hardship came to the trial judge's attention after the juror had been accepted by both the State and the defendant and had been sworn but not impaneled. We held that the trial judge's action did not constitute error.

In *State v.* [illegible] (1970), defendant assigned as error the action of the trial judge in permitting the solicitor to reexamine and successfully challenge for cause a prospective juror who had been passed by the State and tendered to defendant. Before the State passed and tendered this juror, she indicated her willingness to vote for a verdict which would result in the death penalty. Prior to jury impanelment, however, she let it be known that she had changed her opinion about capital punishment. The trial judge thereupon allowed the solicitor to reexamine the prospective juror. The reexamination revealed that she had talked with her pastor during the overnight recess and as a result of that conversation she would not, under any circumstances, vote for a verdict which would impose the death sentence. Over objection, the trial judge allowed the solicitor to successfully challenge her for cause. We approved stating:

> "The competency of jurors is a matter to be decided by the trial judge. Decisions as to a juror's competency at the time of selection and their continued competency to serve are matters resting in the trial judge's sound discretion. G.S. 9-14; *State v. Johnson*, 280 N.C. 281, 185 S.E. 2d 698. The trial judge's ruling on such questions are [sic] not subject to review on appeal unless accompanied by some imputed error of law. *State v. Watson*, 281 N.C. 221, 188 S.E. 2d 289."

See also State v. Atkinson, 275 N.C. 288, 167 S.E. 2d 241 (1969); *State v. Spence*, 271 N.C. 23, 155 S.E. 2d 802 (1967).

The solicitor did not attempt to challenge Mr. Crisp for cause, but challenged him peremptorily. Peremptory challenges are challenges that may be made according to the judgment

of the party entitled thereto without being required to assign the reason therefor, and the reason for challenging a juror peremptorily cannot be inquired into. *State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974); *State v. Allred*, 275 N.C. 554, 169 S.E. 2d 833 (1969).

The court did not abuse its discretion in allowing the district attorney to reexamine these prospective jurors and in excusing one for cause and the other peremptorily. This assignment is overruled.

Defendant's second assignment of error is directed to the [illegible] to disqualify the witness Mrs. Dorothy Wetmore. Defendant [illegible] witness was not mentally competent to testify in that her [illegible] showed that her thought process was extremely confused and [illegible] delusional thinking that her husband was out to get her. Dr. Robert L. Rollins, a qualified psychiatrist and head of the Forensic Unit at Dorothea Dix Hospital, testified that she was suffering from a mental illness known as chronic paranoid schizophrenia.

Defendant did not object to Mrs. Wetmore's competency as a witness or to her testimony during the trial, but after verdict and after sentence had been pronounced, he moved for a new trial for the reason that Mrs. Wetmore was mentally incompetent. Defendant contends that the trial judge abused his discretion in allowing Mrs. Wetmore's testimony to stand after he heard her and Dr. Rollins testify.

In *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970), defendant contended that the court erred in allowing one Epley to testify after a psychiatrist testified that in his opinion it was impossible for Epley to give reliable testimony. In overruling this contention, Justice Sharp, now Chief Justice, speaking for the Court said:

> " . . . The law does not say that the decision of the trial judge as to the competency of a witness shall be controlled by expert medical testimony or that the evidence of a psychiatrist, whether employed by the State or defendant, or appointed by the Court, is entitled to greater weight than that of a qualified lay witness. . . . " *Id.* at 650, 174 S.E. 2d at 799.

In *State v. Robinson*, 283 N.C. 71, 194 S.E. 2d 811 (1973), the defendant contended that the court erred in failing to find that the State's witness Tinsley lacked sufficient mental capacity to be permitted to testify. We held that there was no merit in this contention, quoting with appproval from *State v. Benton*, *supra*, as follows:

> " 'Unsoundness of mind does not per se render a witness incompetent, the general rule being that a lunatic or weak-minded person is admissible as a witness if he has sufficient understanding to apprehend the obligation of an oath and is capable of giving a correct account of the matters which he has seen or heard with respect to the questions at issue. The decision as to the competency of such a person to testify rests largely within the discretion of the trial court.' Accord: *State v. Squires*, 265 N.C. 388, 144 S.E. 2d 49; *State v. Cade*, 215 N.C. 393, 2 S.E. 2d 7; Stansbury, North Carolina Evidence, 2d Ed., § 55; 97 C.J.S., Witnesses, § 57(b)."

And, " . . . [i]t is the consensus that mental eccentricities or aberrations which fall short of complete mental incapacity do not render a witness incompetent, although they may affect his credibility." 3 Jones on Evidence § 20:13, pp. 614-15 (6th ed. 1972).

In *State v. Merrick*, 172 N.C. 870, 90 S.E. 257 (1916), as in the present case, defendant did not object to the testimony of a witness but at the conclusion of the testimony moved to strike. There we stated: " . . . An objection to testimony not taken in apt time is waived. [Citations omitted.] When testimony has thus been admitted without objection, the granting or denying a motion to strike out rests in the discretion of the court. [Citations omitted.] . . . . "

[2] We have held many times that the competency of a witness to testify is to be determined *at the time the witness is called to testify* and rests mainly, if not entirely, in the sound discretion of the trial judge in the light of his examination and observation of the particular witness. 7 Strong, N. C. Index 2d, Witnesses § 1 (1968); *State v. Cooke*, 278 N.C. 288, 179 S.E. 2d 365 (1971); *State v. Bowden*, 272 N.C. 481, 158 S.E. 2d 493 (1968); *State v. Turner*, 268 N.C. 225, 150 S.E. 2d 406 (1966); *Artesani v. Gritton*, 252 N.C. 463, 113 S.E. 2d 895 (1960); *State v. Merritt*, 236 N.C. 363, 72 S.E. 2d 754 (1952).

[3] Defendant waited too late to challenge the competency of Mrs. Wetmore, but assuming that his objections to her competency were timely made, we hold that defendant's motion was properly denied. Mrs. Wetmore's trial testimony, although long and rambling at times, was clear and consistent on all material matters and was fully corroborated by defendant, the local police, and S.B.I. agents. The trial judge had a firsthand opportunity to observe her demeanor, sincerity, perception and memory. There is nothing in the record to indicate that the trial judge abused his discretion in failing to grant defendant a new trial because of Mrs. Wetmore's incompetency to testify.

[4] Defendant next assigns as error that portion of the charge in which the trial court instructed the jury that if the State proved beyond a reasonable doubt that the defendant intentionally killed the deceased with a deadly weapon then "the law raises two presumptions: first, that the killing was unlawful, and second, that it was done with malice."

Defendant's counsel, with commendable candor, states in his brief:

> "Defendant is aware that the instructions complained of here are consistent with the case law of this state. Malice and unlawfulness of the killing are presumed, when a deadly weapon is intentionally used; 4 STRONG INDEX, 2d Homicide, Sec. 14, pp. 207-209. The burden is upon the defendant to disprove malice and reduce a killing to voluntary manslaughter. STATE v. ASHER, 226 N.C. 656, 40 S.E. 2d 26 (1946). Your defendant contends these rules are no longer valid in this society . . . .
>
> • • •
>
> " . . . The defendant is aware that this Court recently rejected this same argument in the case of STATE v. SPARKS, 285 N.C. 631 (1974)."

Defendant is correct. We did reject this argument in *Sparks*, and we adhere to that decision. We need only repeat what we said in *Sparks*, *supra*, at 644, 207 S.E. 2d at 719:

> " . . . We have carefully considered defendant's argument that we should change our well-established rule. However, we are not persuaded to do so. See *State v. Jennings*, [276 N.C. 157, 171 S.E. 2d 447 (1970)]; *State v. Propst* [274 N.C. 62, 161 S.E. 2d 560 (1968)]."

This assignment is overruled.

[5] The trial court also charged:

"The defendant has the burden of proving he was insane. However, unlike the State which must prove the defendant's guilt beyond a reasonable doubt, the defendant need only prove his insanity to your satisfaction.

"Therefore, I charge that if you are satisfied from the evidence that the defendant, at the time of the alleged crime, and as the result of mental disease or defect, either did not know the nature and quality of his act, or did not know that it was wrong, he would be not guilty.

"If you find the defendant not guilty for this reason, but otherwise would have found him guilty, you must find him not guilty by reason of insanity."

Defendant contends that the foregoing instructions in effect limited the jury's permissible not guilty verdict to only a verdict of "not guilty by reason of insanity" and foreclosed the possibility of a verdict of "not guilty" by virtue of possible failings in the State's case. This contention is without merit. On several occasions the trial judge instructed the jury that it might return either of five permissible verdicts and at one time told them that throughout their deliberations they would have a written list designating those verdicts. He clearly stated:

"Under this charge and the evidence in this case, there are five possible verdicts that you can arrive at. First is guilty of First Degree Murder, second is guilty of Second Degree Murder, third is guilty of Voluntary Manslaughter, *the fourth is not guilty*, and *the fifth is not guilty by reason of insanity*.

"And it has been agreed, members of the jury, by counsel for the State and for the defendant that I might submit to you, when you go to your room, a list of the possible verdicts which you can use in your deliberations and in returning your verdict in open Court. Your verdict would be a verbal or oral verdict, but you could use this list as it has been agreed." (Emphasis added.)

Again, immediately before that portion of the charge to which defendant objected, the trial judge carefully recited the substantive elements required to be found by the jury before it could return a verdict of guilty of either first degree murder, second degree murder or manslaughter, and then said: "However, if you do not so find or have a reasonable doubt as to one or more of these things, you will return as your verdict a verdict of not guilty." Following this, the judge charged upon the effect to be given defendant's allegations of mental impairment and then stated: "If you find the defendant not guilty for this reason, but otherwise would have found him guilty, you must find him not guilty by reason of insanity."

Immediately before the jury retired to deliberate, the judge again charged that it might return verdicts of not guilty on all of the offenses charged or not guilty by reason of insanity. This instruction was repeated when the jury returned and asked for additional instructions. " . . . The charge of the court must be read as a whole. *State v. Wilson*, 176 N.C. 751, 97 S.E. 496 (1918). A disconnected portion may not be detached from the context of the charge and then critically examined for an interpretation from which erroneous expressions may be inferred. *State v. Gatling*, 275 N.C. 625, 170 S.E. 2d 593 (1969); *State v. McWilliams* [277 N.C. 680, 178 S.E. 2d 476 (1971)]; *State v. Alexander*, 279 N.C. 527, 184 S.E. 2d 274 (1971)." *State v. Bailey*, 280 N.C. 264, 185 S.E. 2d 683 (1972). *See* 3 Strong, N. C. Index 2d, Criminal Law § 168 (1967).

Construing the charge as a whole, we hold that the trial court properly protected the rights of defendant by instructing the jury to return a verdict of "not guilty" if possessed of any reasonable doubt as to the sufficiency of the State's case, and further by instructing the jury to return a verdict of "not guilty by reason of insanity" if convinced, regardless of the sufficiency of the State's case, that the defendant at the time of the alleged crime, and as the result of a mental disease or defect, did not know the nature and quality of his act or did not know that it was wrong.

Next, defendant assigns as error the court's final mandate to the jury.

Defendant contends that this portion of the charge is conflicting on several material points. We have carefully examined the objected to portion of the charge and fail to detect any such conflict. The instruction complies with settled law in this State. *State v. Woods*, 278 N.C. 210, 179 S.E. 2d 358 (1971); *State*

v. Propst, supra; State v. Gordon, 241 N.C. 356, 85 S.E. 2d 322 (1955). This assignment of error is overruled.

[6] Defendant further contends that the court should have instructed the jury as follows regarding his mental condition at the time of the killing:

> "There is evidence which tends to show that the defendant was insane at the time of the acts alleged in this case. Insanity which precludes the mental process of premeditation and deliberation is a defense to the charge of murder in the first degree.
>
> "Generally insanity is a complete defense to these charges. In order for this to be so the disease or defect must have so impaired the defendant's mental capacity that he either did not know the nature and quality of his act or did not know that it was wrong.
>
> "However, if you find that the defendant had a defect in his mental reasoning you should consider whether this condition affected his ability to formulate the specific intent which is required for conviction of first degree murder. In order for you to find the defendant guilty of first degree murder you must find, beyond a reasonable doubt, that the defendant had the specific intent to kill or to premeditate or to deliberate the killing of Edwin H. Wetmore. If as a result of mental defect of reasoning the defendant did not have the required specific intent, you must find the defendant not guilty of first degree murder."

Several states have adopted a so-called theory of diminished responsibility with respect to specific intent of crimes such as first degree murder, and hold that a defendant may offer evidence of an abnormal mental condition, which, although not sufficient in degree to establish legal insanity, tends to show that he did not have the capacity to deliberate or premeditate at the time the homicide was committed—elements necessary for a conviction of murder in the first degree. Defendant's counsel in his brief admits that North Carolina had not adopted this theory. For a list of cases from other jurisdictions supporting the theory of diminished responsibility, *see State v. Baldwin*, 276 N.C. 690, 174 S.E. 2d 526 (1970). *See also* Annot., 22 A.L.R. 3d 1228.

Our Court has consistently said that the test of insanity as a defense to a criminal charge is the capacity to distinguish

between right and wrong at the time of and in respect to the matter under investigation. *State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 (1975); *State v. Humphrey*, 283 N.C. 570, 196 S.E. 2d 516 (1973); *State v. Benton, supra; State v. Rogers*, 275 N.C. 411, 168 S.E. 2d 345 (1969), *cert. den.* 396 U.S. 1024, 24 L.Ed. 2d 518, 90 S.Ct. 599 (1970). We addressed the exact question before us very recently in *State v. Cooper, supra*, a case very similar on its facts to the present case. The question was carefully examined by Justice Lake writing for the Court. Suffice to say that nothing has transpired in the short period since we decided *Cooper* to incline us to modify our view as there set out.

[7] We have also rejected the irresistible impulse doctrine which defendant here seeks to invoke.

As stated by Justice Branch in *State v. Humphrey, supra*, at 574, 196 S.E. 2d at 519:

> "Defendant's counsel ably presented arguments for adoption of the 'irristible impulse doctrine.' However, neither defendant's arguments nor our research disclose reasons sufficiently persuasive to warrant modification or aborgation of the long recognized 'right and wrong' test of criminal responsibility."

This assignment is overruled.

[8] Finally, defendant contends that the entry of a judgment ordering the death penalty violates the constitutional guarantee against cruel and unusual punishment and that the arbitrariness of the imposition of the death penalty deprives him of equal protection of the law guaranteed by the Constitution. Defendant admits that this Court has rejected this argument in *State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974). We adhere to our decision in that case. Further discussion would serve no useful purpose. *See State v. Fowler*, 285 N.C. 90, 203 S.E. 2d 803 (1974); *State v. Dillard*, 285 N.C. 72, 203 S.E. 2d 6 (1974); *State v. Crowder*, 285 N.C. 42, 203 S.E. 2d 38 (1974); *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19 (1973).

The record in this case discloses a vicious, brutal, senseless murder of a father by a son. The evidence is such that the jury could have found that defendant was not guilty by reason of insanity or, as it did, that defendant, because of hatred for his

father, unlawfully with malice, premeditation and deliberation, killed him. It was for the jury to decide.

Because of the imposition of the death sentence, we have carefully examined the entire record in this case and have considered every contention and argument advanced by defendant. Our examination discloses that defendant received a fair trial, free from prejudicial error.

No error.

Chief Justice SHARP concurring in part and dissenting in part:

The murder for which defendant was convicted occurred on 8 February 1974, a date between 18 January 1973, the day of the decision in *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19, and 8 April 1974, the day on which the General Assembly rewrote G.S. 14-21 by the enactment of Chapter 1201 of the Session Laws of 1973. For the reasons stated in the dissenting opinion in *State v. Jarrette*, 284 N.C. 625, 666 *et seq.*, 202 S.E. 2d 721, 747 *et seq.* (1974), I dissent as to the death sentence imposed upon defendant by the court below and vote to remand for the imposition of a sentence of life imprisonment.

I concur in the decision that defendant is not entitled to a new trial upon the issue of his guilt of the crime charged, for I perceive no error which I believe affected the verdict. However, I do not concur in the statement in the majority opinion that "[w]e addressed the exact question before us very recently in *State v. Cooper*, *supra* [286 N.C. 549, 213 S.F. 2d 305 (1975)], a case very similar on its facts to the present case." There is a fundamental difference in the two cases:

In this case the defendant himself went upon the stand and testified (as set out in the majority opinion) "that he had planned to kill his father for about one week and decided then how he was going to do it and cover it up." By his own admission he was able to premeditate and deliberate, for he formulated and executed a plan to kill his father. He was, therefore, not entitled to a charge that the jury should consider whether he lacked the ability to formulate the specific intent to kill as a result of mental illness. The only question here was whether defendant, at the time he killed his father, was laboring under such a defect of reason in consequence of a disease of the mind

that he was incapable of knowing the nature and quality of his act, or if he did know, whether he could distinguish between right and wrong in relation to it. As to this, defendant himself testified both ways.

In *Cooper* the defendant did not testify. For proof that he killed his victims after premeditation and deliberation, the State had to rely upon circumstantial evidence. Since all the evidence tended to show that Cooper was a chronic sufferer from paranoid schizophrenia and subject to hallucinations and delusions, he contended—in my view, correctly—that the evidence of his mental disease was for the jury's consideration in determining whether the State had proved beyond a reasonable doubt the essential elements of murder in the first degree, *i.e.*, that he had actually formed a specific intent to kill his wife and children and had taken their lives after deliberating and premeditating their deaths.

The dissent in *Cooper* was not based on a doctrine of diminished or partial responsibility. Its thesis was full responsibility, but only for the crime committed. *Id.* at 594, 213 S.E. 2d at 334.

In this case, on the issue of insanity, the judge charged the jury as follows: "I charge that if you are satisfied from the evidence that the defendant, at the time of the alleged crime, and as a result of mental disease or defect, either did not know the nature and quality of his act, or did not know that it was wrong, he would be not guilty."

Obviously this charge assumes that defendant killed his father, a fact which, in the absence of a *judicial admission*, the State must prove beyond a reasonable doubt. The pitfall of such an assumption lies in wait for every trial judge who charges the jury in a case where insanity is pleaded as a complete defense unless the first issue submitted to the jury is whether the defendant killed the deceased. This is a problem to which I called attention in the dissent in *State v. Cooper*, *supra*, at 589-590, 213 S.E. 2d at 331. In the instant case, however, I think the error could not have prejudiced defendant.

Justice COPELAND dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in *State v. Williams*, 286 N.C. 422, 437, 212 S.E. 2d 113, 122 (1975).

Justice EXUM dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion in *State v. Williams*, 286 N.C. 422, 439, 212 S.E. 2d 113, 121 (1975), other than those relating to the effect of Section 8 of Chapter 1201 of the 1973 Session Laws.

STATE OF NORTH CAROLINA v. FERNANDO HUNT

No. 43

(Filed 6 June 1975)

1. **Criminal Law § 66— in-court identification — suggestive pretrial procedures — reliable identification — independent origin**

In a prosecution for rape, felonious assault and armed robbery, pretrial identification procedures were suggestive where defendant was exhibited singly to the victim through a one-way mirror and defendant was the only person who appeared in all of the photographic, showup and lineup identification procedures; however, the totality of circumstances discloses that the victim's identification of defendant was reliable, the court's determination that the victim's in-court identification of defendant was of independent origin was supported by the evidence, and the in-court identification was properly admitted in evidence where the *voir dire* evidence showed that the victim was with her assailant for about 20 minutes, at times in close proximity at a place where interior and exterior lights made identification possible, the victim's description of her assailant's facial characteristics permitted a police specialist to prepare an adequate composite picture of defendant, the victim was able to describe differences in the hair and beard of defendant as she viewed him at the showup, lineup and trial as compared with his appearance on the day she was attacked, and only a month passed between the day of the attack and the victim's positive identification of defendant at the lineup.

2. **Criminal Law § 85— character witness — cross-examination — specific acts of misconduct by defendant**

In this prosecution for rape, felonious assault and armed robbery wherein defendant did not testify, the court erred in permitting the solicitor to ask defendant's character witness on cross-examination whether he knew defendant had served time and was on probation for other crimes, including assault, and whether he would have testified to defendant's good character if he had had such knowledge, and such error was not cured when the court on the following day instructed the jury to disregard the solicitor's questions to the witness.

Justice COPELAND dissents.

ON *certiorari* to
S.J., at the 10 June
Court.

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dated for trial, and
each charge.

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badly beaten about
an ambulance and

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Appendix B

Extension of Time By U. S. Supreme Court in Which to File Petition For Writ of Certiorari.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

September 5, 1975

Larry G. Ford, Esq.
Davis, Ford and Weinhold
215 N. Main Street
P. O. Box 585
Salisbury, North Carolina 28144

Re: Roger Lawrence Wetmore v. North Carolina
No. A-206

Dear Mr. Ford:

Your application for an extension of time in which to file a petition for writ of certiorari in the above-entitled case has been presented to Mr. Justice White, who today signed an order extending your time to and including October 6, 1975, subject to later determination whether the extension of time was timely requested.

A copy of the Justice's order is enclosed.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By Paul L. Jones

Paul L. Jones
Assistant Clerk

dam
Enclosure

cc: Honorable Rufus Edmisten
Attorney General of North Carolina
Justice Building
P. O. Box 629
Raleigh, North Carolina 27602

Supreme Court of the United States

No. A-206

ROGER LAWRENCE WETMORE,

Petitioner

v.

NORTH CAROLINA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 6, 1975, subject to later determination whether the extension of time was timely requested.

/S/ Byron R. White
Associate Justice of the Supreme Court of the United States

Dated this 5th day of September, 1975.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

September 30, 1975

Larry G. Ford, Esq.
Davis, Ford and Weinhold
215 N. Main Street
P. O. Box 585
Salisbury, North Carolina 28144

RE: Roger Lawrence Wetmore v. North Carolina
No. A-206

Dear Mr. Ford:

Your application for a further extension of time in which to file a petition for writ fo certiorari in the above-entitled case has been presented to Mr. Chief Justice Burger, who on September 26, 1975, signed an order extending your time further to and including November 4, 1975.

A copy of the Chief Justice's order is enclosed.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By Paul L. Jones

Paul L. Jones
Assistant Clerk

dam
Enclosure

cc: Honorable Rufus Edmisten
Attorney General of North Carolina
Justice Building
P. O. Box 629
Raleigh, North Carolina 27602

Clerk, Supreme Court of North Carolina
Post Office Box 2170
Raleigh, North Carolina 27602

Supreme Court of the United States

No. A-206 ~~October Term, 19~~

ROGER LAWRENCE WHITMORE,

Petitioner

v.

NORTH CAROLINA

FURTHER ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including November 4, 19 75

/S/ Warren E. Burger

Chief Justice of the United States.

Dated this 26th

day of September, 19 75

Appendix C

Pp. 25-65 , Petition for Writ of Certiorari to the Supreme Court of North Carolina, Dillard v. North Carolina, No. 73-6875 (filed June 11, 1974).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This case and four contemporary cases[6/] present the question of the constitutionality of the death penalty as that penalty was resurrected in the State of North Carolina by a four-to-three vote of the North Carolina Supreme Court following Furman v. Georgia, 408 U.S. 238 (1972). A brief review of post-Furman developments relating to the death penalty in the United States generally and in North Carolina particularly sets the question in perspective.

The nearly universal response of state courts in obedience to Furman was to hold that death sentences could no longer be meted out under the capital punishment laws which had been in effect prior to June 29, 1972, and which the Furman decision

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6 / Crowder v. North Carolina, O.T. 1973, No. 73-
Henderson v. North Carolina, O.T. 1973, No. 73-
Jarrette v. North Carolina, O.T. 1973, No. 73-
Noell v. North Carolina, O. T. 1973, No. 73-

of that date declared unconstitutional.[7] Subsequently, statutes

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7/ See, e.g., United States v. Lee, 489 F.2d 1242 (CA DC 1972); United States v. Woods, 484 F.2d 127, 138 (CA4 1973) ("Since the decision in Furman v. Georgia, ... the statute under which defendant was convicted of first degree murder, 18 U.S.C. §111, provides as the only possible sentence imprisonment for life" at 138); United States v. McNally, 485 F.2d 398 (CA8 1973); Hubbard v. State, 290 Ala. 118, 274 So.2d 293 (1973) ("There is no question that Furman has, as of now, eliminated the death penalty from our statute. The elimination of the death penalty does not destroy the entire statute. The only sentence which can now be imposed upon conviction of the crime of murder in the first degree is life imprisonment." 274 So.2d at 300); State v. Endreson, 109 Ariz. 117, 506 P.2d 248 (1973) ("In view of [the Furman ruling] we hold that the death penalty provisions of [the Arizona murder statute] are unconstitutional." 506 P.2d at 254); O'Neal v. State, 253 Ark. 574, 487 S.W. 2d 618 (1972); People v. Murphy, 8 Cal. 3d 369, 105 Cal. Rptr. 138, 503 P.2d 594 (1972); State v. Aillon, ___Conn.___, 295 A.2d 666 (1972); Anderson, et al., v. State, 267 So. 2d 8 (Fla. 1972); Sullivan et al. v. State, 229 Ga. 731, 194 S.E. 2d 411 (1972); People v. Speck, 52 Ill. 2d 284, 287 N.E. 2d 609 (1972) ("The Supreme Court of the United States has now held that a defendant could not be validly sentenced to death under [pre-Furman Illinois capital statutes]." 287 N.E.2d at 700; Adams v. State, ___Ind.___, 284 N.E.2d 757 (1972); State v. Randol, 212 Kan. 461, 513 P.2d 248 (1973) (". . .court is of the opinion that the death penalty provision of our present statute is constitutionally impermissible. The 1972 Legislature of Kansas considered but failed to enact amendatory legislation." 513 P.2d at 256); Caine and McIntosh v. Commonwealth, 491 S.W.2d 824 (Ky. 1973), cert. den. 414 U.S. 876; State v. Flood, 263 La. 700, 269 So.2d 212 (1972) ("the Furman case has eliminated 'capital offenses' in Louisiana." 269 So.2d at 214); Bartholmey v. State, 267 Md. 175, 297 A.2d 696 (1972); Commonwealth v. LeBlanc, ___Mass.___, 299 N.E.2d 719 (1973); Capler v. State, ___Miss.___, 268 So. 2d 338 (1972) (". . . the harsher penalty of death may not be lawfully imposed. The remaining part of the statute is complete. . . .We hold that because of Furman v. Georgia, the death penalty cannot be inflicted, that the remainder of the statute is valid and the only other punishment for murder is life imprisonment." 268 So.2d at 339-40); State v. Scott, 491 S.W.2d 514 (Mo. 1973) ("The sole and only punishment for first degree murder in this state is now life imprisonment." at 521); State v. Alvarez, No. 27435, Dist. Ct. Lancaster Cty., Neb. Oct. 4, 1972; Walker v. State, 88 Nev. 539, 501 P.2d 651 (1972); State v. Martineau and Nelson, 112 N.H. 278, 293 A.2d 766 (1972); People v. Fitzpatrick, 32 N.Y. 2d 499, 300 N.E. 2d 139 (1973), cert. den. 38 L.Ed. 2d 338, 94 S.C. 554 (1973); State v. Johnson, 31 Ohio St. 2d 106, 285 N.E.2d 751 (1972) ("Under [the Furman] holding, which we are required to follow, the infliction of the death penalty under the existing law of Ohio is now unconstitutional [with possible exceptions not relevant here]." 285 N.E. 2d at 755); Pate v. State, 507 P.2d 915 (Okla. 1973) ("After an exhaustive study of the [Furman] opinions . . . this court reluctantly finds that it is impermissible, under said decisions, to impose a sentence of death on any convicted person until such time as

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were enacted in slightly more than half the States (and by the federal government), authorizing the use of the punishment of death in differingly defined categories of cases.[8] The statutes vary widely in their terms and forms, and consequently vary

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7/ cont'd

the laws have been duly enacted conforming to the standards set forth in Furman v. Georgia," at 916); Commonwealth v. Bradley, 449 Pa. 19, 295 A.2d 842 (1972); Hunter, et al. v. State, ___ Tenn. ___, 496 S.W.2d 900 (1972) ("The effect of [Furman] ... is to render void the penalty of death as it exists under the statutes of Tennessee." 496 S.W.2d at 902); Lopez v. State, 500 S.W.2d 844 (Tex. Crim. 1973) (". . . we find the inescapable conclusion to be that the holding in Furman and Branch rendered it impermissible under the Constitution of the United States to impose the death penalty under our ten existing statutes." At 846); Wood v. Commonwealth, 213 Va. 346, 192 S.E.2d 808 (1972); State v. Vidal, 82 Wash.2d 94, 508 P.2d 158 (1973) ("The recent case of Furman v. Georgia . . . has the effect of preventing the imposition of the death penalty under the existing statutes of the State of Washington." 508 P.2d at 162).

8/ Some of these new statutes provide that a court or jury must make a separate determination as to whether a defendant should be sentenced to life or death independently of its finding the defendant guilty of a capital crime; conviction of a particular offense does not, therefore, necessarily result in a death sentence. Some of these laws provide a single verdict proceeding, in which the trial judge or jury must return a general verdict finding a defendant guilty of a capital degree of the offense. Del. Code, tit. 11, § 636 (1974), as amended by Del. H.B. No. 429, 127th Gen. Ass. (1974); N.H. Rev. Stat. Ann. § 630:1(I) (1973), as amended by N.H. S.B. 27, Chap. 34, Acts of 1974, N.H. Gen. Ct.; N.Mex. Stat. §§ 40A-2-1, 40A-2-1(A), 40A-29-2 (1974); N.C. Gen. Stat. §§ 14-17, 14-21, as amended by S.B. 157, Chap. 1201, 1973 Sess. Laws (2nd Sess. 1974); Tenn. Code Ann. §§ 39-2402 (as amended by Pub. Chap. 462, Tenn. Laws 1974), 39-3702 (as amended by Pub. Chap. 461, Tenn. Laws 1974) (1974). Others of these statutes provide a unitary proceeding where a jury must return a verdict finding special facts to justify the death sentence. Ind. Code § 10-3401 (1974); Ky. Rev. Stat. Chap. 507, as amended by Ky. H.B. No. 232, Reg. Sess. 1974; La. Rev. Stat. §§ 14:30, 14:42, 14:44, 14:113 (1974); La. Code

somewhat in the questions they present regarding their compliance with Furman and with the Eighth and Fourteenth Amendments to

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8/ cont'd

Crim. Proc., Art. 557, 598, 817 (1974); Miss. Code §§ 97-3-19, 97-3-65 (1974), as amended by Miss. S.B. No. 2341, Reg. Sess. 1974; Mont. Code §§ 94-5-102, 94-5-103, 94-5-105, 94-5-304 (as amended by Mont. H.B. No. 643, Mont. Gen. Laws 1974) (1974); Nev. Code § 200.030 (1974); Okla. Stat., tit. 21, §§ 701.1, 701.3, 701.6 (1974); Wyo. Stat. § 6-54 (1974). Among the new laws which provide a bifurcated proceeding to make this separate determination as to sentence, some allow imposition of sentence without any particular finding identified by the legislature as a prerequisite for imposing either a sentence of death or life imprisonment. Ga. Code § 27-2534.1 (1973), as amended by No. 74, Ga. 1973 Sess. Laws at 162-172; Utah Crim. Code §§ 76-3-206, 76-5-202, 76-5-302, 76-3-207 (1974). Others of these bifurcated trial statutes require the imposition of a death sentence when a certain finding is made at the sentencing proceeding; some identify a particular circumstance which justifies imposition of a death sentence. Cal. Penal Code §§ 190, 190.1, 190.2, 209, 219, 4500 (1974); Ill. Code §§ 5-8-1a, 9-1 (1974); Tex. Pen. Code § 19.02 (1974); Tex. Code Crim. Proc., Art. 37.071 (1974); others identify such circumstances but provide that such "aggravating" circumstances may be counterbalanced by the finding of "mitigating" circumstances in some unspecified fashion, Ariz. Rev. Stat. §§ 13-452 - 13-454 (1974; Ark. Code §§ 41-4702 - 41-4713 Fla. Stat. §§ 782.01, 794.01, 792.141 (1974); Neb. Code §§ 28-401, 29-2522, 29-2523, 29-2524 (1974); still others provide formulae for the weighting of "aggravating" against "mitigating" circumstances to determine which defendants shall be sentenced to death. Conn. Gen. Stat. § 53a-45 (1974); Ohio Rev. Code §§ 2929.03, 2929.04 (1974); Pa. Stat., tit. 18, § 4701 (1974), as amended by Pa. H.B. 1060, Act. 46, 1974 Sess.

Another group of statutes provides for the imposition of a death sentence by operation of law pursuant to a jury's or trial judge's conviction of a certain crime. Idaho Code §§ 18-4003, 18-4004 (1974); R.I. Code § 11-23-2 (1974); New York: Ass. Bill 11474, 1974 Sess. Laws.

The following States have not enacted legislation authorizing the death penalty since Furman: Alaska, Alabama, Colorado, Hawaii, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, North Dakota, Oregon, South Carolina, South Dakota, Virginia, Washington, West Virginia, Wisconsin, Vermont.

the Constitution. [9] It is a fair although gross generalization that, in most States, the new statutes authorize capital punishment for a narrower category of offenses than those that were punishable by death in the same States before Furman. Of the 103 men and women who have been sentenced to die in the United States since June 29, 1972, and who are presently on death row, [10] roughly two-thirds were condemned under the new post-Furman statutes.

Virtually all of the remainder [11] -- 31 men and women, to be

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9/ The first decisions by the highest court of any State affirming death sentences imposed under one of the new post-Furman statutes were handed down in a Georgia murder case, State v. House, Ga. Sup. Ct. No. 28678 (April 4, 1974) (rehearing denied, April 25, 1974); and in a Georgia rape case, State v. Eberheart, Ga. Sup. Ct. No. 28776 (April 30, 1974) (rehearing denied, May 21, 1974). Counsel for Mr. House and Mr. Eberheart (who include some of the counsel for petitioner Dillard) are presently preparing to seek review by this Court of the Georgia Supreme Court's decisions.

10/ We exclude from this computation a number of persons sentenced to death since Furman whose convictions or death sentences have been reversed or vacated on appeal. The 99 figure represents persons presently committed under unreversed and unvacated sentences of death.

11/ Seven persons have been sentenced to die since Furman under the provisions of pre-Furman statutes. The cases of six of these persons (in Massachusetts, Montana, Pennsylvania, and South Carolina) are described in note 14, infra. The remaining case arises under a Virginia statute which the Virginia Supreme Court held distinguishable from the statutes invalidated in Furman. State v. Jefferson, Va. S.C., No. 730370, decided April 22, 1974. A petition for rehearing is presently pending in Jefferson. Should it be denied, counsel for Mr. Jefferson (who are associated with some of the counsel for petitioner Dillard) anticipate that review will be sought in this Court.

exact -- are on death row in North Carolina, where post-Furman developments took a markedly different turn by the margin of a single vote on the North Carolina Supreme Court in the case of State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973). Prior to 1947, North Carolina law had required the imposition of the death penalty upon all convictions for the crimes of first-degree murder, rape, first degree burglary, and arson. By enactments of 1947 and 1949, the North Carolina General Assembly provided that, in the case of convictions for any of these four offenses, the jury might spare the defendant's life by a recommendation of life imprisonment. 12/ An unanimous Supreme Court of North Carolina

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12/ The jury was given the power to recommend life imprisonment in arson and burglary cases in 1947, and in murder and rape cases in 1949. We have found no legislative history dealing directly with the 1947 enactment.

The limited legislative history available for the 1949 North Carolina legislative action reflects a clear and considered abandonment of a general mandatory death penalty. As noted in State v. Pugh, 250 N.C. 278, 168 S.E.2d 649, 642 (concurring opinion of Denny, J.), the 1947 General Assembly created a Special Commission for the Improvement of the Administration of Justice. That Commission recommended, inter alia:

> "We propose that a recommendation of mercy by the jury in capital cases automatically carry with it a life sentence. Only three other states now have the mandatory death penalty and we believe its retention will be definitely harmful. Quite frequently, juries refuse to convict for rape or first degree murder, because, from all the circumstances, they do not believe the defendant, although guilty, should suffer death. The result is that verdicts are returned hardly in harmony with evidence. Our proposal is already in effect in respect to the crimes of burglary and arson. There is much testimony that it has proved beneficial in such cases. We think the law can now be broadened to include all capital crimes."

[footnote continued]

concluded in Waddell that, as amended in 1947 and 1949 and operative for nearly a quarter-century between 1949 and 1972, the North Carolina statutes inflicting capital punishment for first degree murder, rape, first degree burglary and arson were unconstitutional under Furman. Three Justices of the court therefore would have held that the death penalties provided by North Carolina law on the dates of the Furman and Waddell decisions were constitutionally unenforceable then and thenceforth until (at the least) the enactment of new capital punishment legislation by the General Assembly. But a majority of four Justices

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12/ cont'd.

POPULAR GOVERNMENT (January 1949) (published by the Institute of Government, University of North Carolina, Chapel Hill, North Carolina), p. 13. - The North Carolina Supreme Court commented on the legislative intent indicated by the 1949 measures in State v. McMillan, 233 N.C. 630, 65 S.E.2d 212, 213 (1951).

> "The language of this amendment stands in bold relief. It is plain and free from ambiguity and expresses a single, definite and sensible meaning, - a meaning which under the settled law of this State is conclusively presumed to be the one intended by the Legislature.
>
> "It is patent that the sole purpose of the act is to give to the jury in all cases where a verdict of guilty of murder in the first degree shall have been reached, the right to recommend that the punishment for the crime shall be imprisonment for life in the State's prison . . . . No conditions are attached to, and no qualifications or limitations are imposed upon, the right of the jury to so recommend. It is an unbridled discretionary right. And it is incumbent upon the court to so instruct the jury. In this, the defendant has a substantive right."

held that the only portion of North Carolina law invalidated by Furman was the 1949 "recommendation" provision, with the result that (prospectively from the January 18, 1973, date of the Waddell decision) North Carolina law reverted to its pre-1949 state:

> "[T]he effect of the Furman decision upon the law of North Carolina concerning the punishment for rape, murder in the first degree, arson and burglary in the first degree is this: Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death." (State v. Waddell, 282 N.C. 431, 194 S.E.2d 19, 28-29(1973).)

Under these procedures, petitioner and the other 30 persons now inhabiting North Carolina's death row were sentenced to die between the date of Waddell and the date of the enactment of a new North Carolina death penalty statute on April 8, 1974. 13/

The question presented here is the federal constitutionality of death sentences imposed in North Carolina pursuant to the Waddell procedures and without new legislative authorization after Furman. Most immediately, that question is potentially decisive of the lives of the 31 condemned inmates in the State

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13/ See note 2, supra.

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which now has the largest death row population in the Nation. It may also have direct implications for death sentencing in four other States.[14/] Depending, of course, upon the grounds on which this Court elects to consider the question, it may or it may not have implications -- of narrower or broader scope -- for the death penalties enacted by post-Furman legislation.

14/ The only other state appellate court that has dealt with Furman in the fashion of Waddell is the Supreme Court of Delaware, in State v. Dickerson, Del., 298 A.2d 761 (1972). The Dickerson opinion was announced prospectively on November 1, 1972. No capital convictions were returned in the State of Delaware between that date and the dates upon which, successively, (1) a new criminal code enacted before Furman but effective July 1, 1973, came into effect, repealing the statutory provisions upon which Dickerson rested, and (2) the Delaware legislature enacted a post-Furman statute effective March 29, 1974. There is presently pending litigation in the Delaware Supreme Court raising the issues of the effects upon Dickerson of the supervening code and post-Furman enactment. State v. Smith, Del. S.C. No. 52,1974.

Trial courts in Massachusetts and South Carolina have imposed death penalties after Furman under the purported authorization of pre-Furman statutes and in apparent reliance upon the rationale of Waddell and Dickerson. Commonwealth v. Brown, Clinkscales, and Johnson, Superior Ct., Suffolk Co. (Mass.), Nos. 74502-3-4 and 74516-17-18; State v. Speights, Ct. of Gen. Sess., Florence Co. (S.C.), No. 5053. It is also possible that three post-Furman death sentences imposed in Montana and Pennsylvania under pre-Furman legislation rest upon the same rationale, although the trial judges' reasoning in these cases more likely stands upon other grounds. State v. Rhodes & Shields, Mont. S. Ct. Nos. 12596 and 12597; Commonwealth v. Martin, Pa. Sup. Ct., No. 44 (March Term, 1974). All of the cases just mentioned are presently pending in the respective Supreme Courts of the States in which they arise.

A. Evasion of the Furman Decision

The narrowest issue raised is simply whether the majority of the North Carolina Supreme Court in Waddell read Furman correctly and applied Furman permissibly in holding that Furman invalidated only the 1949 "recommendation" provision of North Carolina law, rather than the underlying death penalty. As tortured as that holding may seem -- being the lethal equivalent of a state-court holding that Brown v. Board of Education required the closing of the public schools instead of their desegregation -- it is not entirely unprecedented. Twice in recent years this Court has corrected similar manipulations of state-law severability doctrines designed to emasculate a constitutional decision of the Court forbidding the imposition and carrying out of impermissible death sentences. Funicello v. New Jersey, 403 U.S. 948 (1971) (alternative ground); Thomas v. Leeke, 403 U.S. 948 (1971).

These two cases involved provisions of New Jersey and South Carolina law which allowed capitally-charged defendants to avoid the possibility of a death sentence by pleading non vult (in New Jersey) or guilty (in South Carolina), and thus affronted the rulings in United States v. Jackson, 390 U.S. 570 (1968), and Pope v. United States, 392 U.S. 651 (1968). The South Carolina Supreme Court in Thomas recognized the incompatibility of its statutory guilty-plea scheme with the constitutional principle of Jackson, but held that the result was to invalidate and sever the guilty-plea provision, leaving the death penalty standing. The New Jersey Supreme

Court attempted to distinguish Jackson but held alternatively that, if Jackson did invalidate New Jersey's non vult provision, that provision rather than the death penalty would be rendered inoperative. In both cases, then, the state-court reaction to decisions of this Court invalidating a composite statutory death-sentencing procedure under which unknown numbers of capital defendants had escaped the death penalty while others had unconstitutionally been sentenced (and many sent) to their deaths, was to sever the escape clause, treat it as though it had never existed for constitutional as well as state-law purposes, and condemn those denied its benefits to die. In both cases, this Court declined the gambit.

What a majority of the North Carolina Supreme Court has done here, albeit by a somewhat different mechanism, is much the same thing. During a quarter of a century between enactment of the legislative "recommendation" procedure in 1949 and enactment of a new post-Furman death-sentencing procedure by the North Carolina legislature in 1974, countless men died and others guilty of identical crimes were spared death pursuant to an arbitrary selective procedure which -- as the North Carolina Supreme Court itself has concluded -- falls unmistakably within the ban of Furman. The response of four Justices of that court is to say essentially that, because the persons spared should not have been spared (under an appropriate manipulation of state severability theory), the fact that they were spared is to be disregarded in determining whether the continued application of the pre-Furman North Carolina statutes authorizing capital

punishment would be arbitrary and selective, and hence a constitutionally cruel and unusual punishment, in the wake of Furman. Thirty-one more persons are thus tossed into the death column as opposed to the now closed and hence forgotten column of the spared, upon the capital punishment ledgers of North Carolina since 1949. Whether the particular state-law contrivance by which that calculation is accomplished makes the deaths of these 31 persons any less selective, arbitrary, cruel and unusual in federal constitutional contemplation is, we suggest, an issue that this Court should address, if its Furman decision is to have the vitality and respect that the Supremacy Clause rightly commands.

B. The Lawless Imposition Of Death Penalties

The second issue presented is whether the re-institution of the death penalty which the North Carolina Supreme Court achieved by amputating life from that State's life-or-death sentencing statutes is a result that can constitutionally be effected by any device of judicial decision wholly ungoverned and undirected by legislative action. It is, of course, generally true that the federal Constitution is not concerned with how a State divides it law-making functions between its judicial and legislative organs. But that generalization cannot be permitted to sweep away the fundamental concerns of the Eighth and Fourteenth Amendments against judicial imposition of harsh criminal punishments unauthorized by law and in excess of the penalties provided by "the valid laws of the land." Giaccio v. Pennsylvania, 382 U. S. 399, 403 (1966).

Recent scholarship has underscored that the English Bill of Rights, from which the Eighth Amendment's prohibition of "cruel and unusual punishments" was derived, was in large measure directed toward preventing the exaction of unauthorized penalties.[15/] That

15/ Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 CAL. L. REV. 839, 845-847, 852-860 (1969). It is true that Granucci also finds that the American Framers imperfectly understood the English background of the cruel-and-unusual-punishment clause, and that they themselves were principally concerned with the problem of intrinsically barbaric penalties. But this does not support a conclusion that the Framers meant to diminish the scope of a guarantee that they believed basic to their traditions (see 3 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 447 (1863)), or to reject protections of the citizen long preserved by their English heritage. Indeed, as early as 1635, American settlers had "conceived great danger . . . in regard that . . . magistrates, for want of positive laws, in many cases, might proceed according to their discretions," and had therefore agreed "that some men should be appointed to frame a body of grounds of laws, in resemblance to a Magna Charta, which being allowed by some of the ministers and the general court, should be received for fundamental laws." WHITMORE, COLONIAL LAWS OF MASSACHUSETTS 1630-1686, at 5 (1889). It should hardly be surprising that the cruel-and-unusual-punishment clause, like many of the other basic guarantees of the Bill of Rights, is woven of several strands and protects against more than a single evil.

function remains a vital office of the cruel-and-unusual punishment clause today,[16] although it certainly is not the exclusive focus of the clause.[17] As this Court pointed out in Weems v. United States, 217 U. S. 349, 376 (1909), the Framers were eager to assure "that government by the people, instituted by the Constitution, would not imitate the conduct of arbitrary monarchs. The conjunction of the words "cruel" and "unusual" in the Eighth Amendment can hardly be regarded as accidental if one appreciates the relationship, within a basically popular and democratic governmental structure, of the dangers of lawlessness, irregularity, arbitrary selectivity,[18] and cruelty.[19] For, in such a structure, harsh and unsufferable criminal penalties are most likely to spring from devices that elude the rule of law or subvert the ordinary protections afforded by its regularity and generality.

Due Process of Law, too, insures against the imposition of criminal sanctions that are not decreed in strict accordance with the regular course of law.

> "The terms 'due process of law' . . . come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the Crown and place him under the protection of the law. They were deemed to be equivalent to 'the law of the land.'" Kent v. West Virginia, 129 U. S. 114, 123 (1888).

16/ See Wheeler, Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment, 24 STAN. L. REV. 838, 855-856 (1972).

17/ See Weems v. United States, 217 U. S. 359 (1909); Robinson v. California, 370 U. S. 660 (1962); Furman v. Georgia, 408 U. S. 238 (1972). And see note 15, supra.

18/ See section I(C), pp. 28-44, infra.

19/ This relationship is developed in Brief for Petitioner, Aikens v. California, 406 U. S. 813 (1972) [No. 68-5027], pp. 13-27, 39-56.

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"The essence of [the] . . . . principle of legality is limitation on penalization by the State's officials, effected by the prescription and application of specific rules."[20] So rudimentary has this principle been to American notions of Due Process, that unauthorized criminal penalties have rarely been imposed in this country;[21] but, on the rare occasions when they have been examined by this Court, the Court has treated them as self-evidently void to the extent that they exceeded what was authorized by valid legislation. Ex parte Lange, 83 U. S. 163 (1874); Ex parte Mills, 135 U. S. 263 (1890); In re Bonner, 151 U. S. 243 (1894). In this century, the root principle has been most commonly observed in its offshoots: the vagueness doctrine as applied to penalties, Giaccio v. Pennsylvania, 382 U. S. 399 (1966); the lenity principle, Ladner v. United States, 358 U. S. 169 (1958);[22] and this Court's

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20/ HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 28 (2d ed. 1960).

21/ But see Ashton v. Kentucky, 384 U. S. 195 (1966).

22/ "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication. [Citations omitted.] . . . 'When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.' . . . This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." Id. at 177-78.

adamant refusal to undertake either the judicial fashioning of criminal punishments, United States v. Evans, 333 U. S. 483 (1948), or the judicial fashioning of procedures for the imposition of criminal punishments, United States v. Jackson, 390 U. S. 570 (1968).[23] Under the rule of law guaranteed by Due Process, the creation of criminal sanctions is, quite simply, "no part of [judges'] . . . duties." United States v. Reese, 92 U. S. 214, 221 (1875).

The question here is whether the North Carolina Supreme Court has infringed that principle, or whether the state-law characterization of what was done in Waddell as a mere application of severability doctrine saves palpable judicial promulgation of the harshest penalty known to mankind[24] from the constitutional

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23/ "It is one thing to fill a minor gap in a statute -- to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality." Id. at 580.

24/ See the opinion of Mr. Justice Sharp, dissenting in State v. Waddell, 282 N.C. 431, ___, 194 S.E.2d 19, 48 (1973):

> "This Court, which has consistently deplored the encroachment of other courts upon the legislative prerogatives during the past decade, now follows suit and sets its own example of judicial overreaching by changing the penalty for rape, first degree murder, arson and first degree burglary 'from death or life imprisonment in the discretion of the jury to mandatory death.'"

C. The Perpetuation of Arbitrary Discretion in the Selection of Those Who Must Die.

The third issue presented is whether the capital trial procedure approved for North Carolina by the Waddell decision violates Furman's prohibition of arbitrary selectivity in the administration of the death penalty. Although the prevailing opinions in Furman differ somewhat regarding the questions left unanswered by the Furman holding, they all condemn at least any system of capital punishment in which some persons are chosen to live and others identically situated are consigned to die by irregular and erratic selective processes.[26/] The form of those

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26/ The concurring-Furman opinions of Mr. Justice Brennan (408 U.S. at 257-306) and Mr. Justice Marshall (408 U.S. at 314-374) entertained the view that the death penalty is unconstitutional per se, regardless of the presence or absence of discretion in the procedural system whereby it is applied.

Mr. Justice Douglas did not reach the question "[w]hether a mandatory death penalty would . . . be constitutional," 408 U.S. at 257, but held the death sentences under review in Furman and companion cases unconstitutional under the Eighth and Fourteenth Amendments because they were the result of a procedure which discriminated against certain defendants upon the basis of "race, religion, wealth, social position [and] class" and which "[gave] room for the play of such prejudices." 408 U.S. at 242.

Mr. Justice Stewart found it "unnecessary to reach the ultimate question [whether "the infliction of the death penalty is constitutionally impermissible in all circumstances"], 408 U.S. at 306, since he found that the death sentences under review were "wantonly and . . . freakishly imposed," 408 U.S. at 310, and therefore in violation of the Eighth and Fourteenth Amendments. "[O]f all the people convicted of rapes and murders . . . , many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." 408 U.S. at 309-310 (footnote omitted).

Mr. Justice White declined to consider the question of whether "the death penalty is unconstitutional per se," 408 U.S. at 311, and held only that capital punishment was unconstitutional when it "is exacted with great infrequency even for the most atrocious crimes and . . . [when] there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 U.S. at 313.

charge of lawlessness. The question is not, of course, whether four or three Justices of the North Carolina Supreme Court more nearly guessed what the North Carolina legislature might have wanted in the wake of Furman, in light of the fact that its last pronouncement on the subject -- a quarter-century old -- was long sealed together with the irremediable fates of those who had been chosen to live or to die under the discretionary sentencing regime for which it then unmistakably opted.[25/] Rather the question is whether judicial fiat, with nothing more than the profession of that kind of guesswork to connect it with the regular and accepted method of providing by law for the punishment of crimes, can withstand scrutiny under federal constitutional guarantees designed as limitations upon the lawless exaction of overbearing and unauthorized criminal penalties.

25/ State v. Waddell, 282 N.C. 431, ____, 194 S.E. 2d 19, 26 (1973); State v. Mathis, 236 N.C. 508, 53 S.E.2d 666 (1949); and see note 12, supra.

processes can hardly be thought constitutionally dispositive. See Commonwealth v. A Juvenile, 1973 Mass. Adv. Sh. 1199, 300 N.E.2d 434 (1973).[27] What is important is their result: a lawless and capricious dispensation of life and death, in which death sentences are "freakishly imposed." Furman v. Georgia, supra, at 310 (Mr. Justice Stewart, concurring).

In considering whether the Waddell procedures comply with Furman or whether the North Carolina Supreme Court has merely displaced the focus, lowered the visibility, diffused the responsibility, and thereby increased the predictable arbitrariness and discrimination of persisting discretionary processes for the administration of the death penalty,[28] this Court will

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27/ In this case, the Supreme Judicial Court of Massachusetts ruled that Furman invalidated a death sentence under a "mandatory" death penalty statute, if arbitrary procedures made it possible for some defendants to escape being subjected to the extreme punishment. The Court held that when a juvenile could be adjudicated either as an adult for rape-murder (in which case, the death sentence was "mandatory" under Mass. Gen. Laws Ann. c.265 §2) or as a juvenile (in which case no death sentence could be imposed), a death sentence imposed pursuant to the adult "mandatory" statute could not be affirmed, since Furman invalidated "discretionary imposition of the death sentence," 300 N.E. 2d at 442 (emphasis in original), regardless of where in the process this discretion was lodged.

28/ The discretion which is concealed but inevitable in a purportedly "mandatory" death-sentencing system is likely to be influenced by impermissible considerations to at least as great an extent as the visible discretion that Furman found unconstitutional. North Carolina's experience with a "mandatory" statute prior to 1949 reflects this point. Between 1910 and 1949, 75% of all persons received under sentence of death were non-white; between 1950 and 1972, 63% of those so received were non-white. Similarly, 80% of persons executed under the pre-1949 "mandatory" system were non-white; 73% of executions under the post-1949 "discretionary" system were of non-whites. (Data compiled from BEHRE, A BRIEF HISTORY OF CAPITAL PUNISHMENT IN NORTH CAROLINA, Tables 2 and 3, (North Carolina Office of Corrections, September

want to consider the following characteristics, among others, of North Carolina law and practice:

28/ cont'd.

1973)). It appears that under the "mandatory" system created by the Waddell decision similar forces are at work: as of June 1, 1974, 24 of the 34 defendants condemned to die for crimes committed between January 18, 1973 (the date of Waddell) and April 8, 1974 (the effective date of the new North Carolina capital punishment statute), or 71%, are non-white, approximately the percentage of those condemned to die who were non-white under the pre-Furman "mandatory" system. Death sentences have been affirmed or imposed under the Waddell procedures in the following cases:

State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974); State v. Crowder, 285 N.C. 42, 203 S.E.2d 38 (1974); State v. Dillard, 285 N.C. 72, 203 S.E.2d 6 (1974); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974); State v. Poole, Moore County Superior Ct., No. 73-Cr-2710 (August 17, 1973), rev'd ___ N.C. ___, 203 S.E. 2d 786 (April 10, 1974); State v. Monk, New Hanover County Superior Ct., No. 73-Cr-6476 (August 24, 1973); State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974); State v. Britt, Robeson County Superior Ct., No. 73-Cr-6567 (September 6, 1973), rev'd ___ N.C. ___, ___S.E.2d ___, N.C. Sup. Ct. No. 36 (Robeson) (May 15, 1974); State v. Spicer, New Hanover County Superior Ct., No. 73-Cr-8034 (September 12, 1973), rev'd ___ N.C. ___, ___S.E.2d ___, N.C. Sup. Ct. No. 25 (Hanover) (May 15, 1974); State v. Ward, Edgecombe County Superior Ct., No. 73-Cr-6706 (September 19, 1973); State v. Fowler, ___ N.C. ___, 203 S.E.2d 803 (1974); State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844 (1974); State v. Bell, Robeson County Superior Ct., No. 73-Cr-12351 (October 18, 1973); State v. Sparks, Guilford County Superior Ct., No. 73-Cr-19776 (November 1, 1973); State v. Anthony Carey, Mecklenburg County Superior Ct., No. 73-Cr-46179 (November 8, 1973); State v. White, Alamance County Superior Ct., No. 73-Cr-12672 (December 6, 1973); State v. Brown, Edgecombe County Superior Ct., No. 72-Cr-7238 (December 9, 1973); State v. Hines, Edgecombe County Superior Ct., No. 73-Cr-7239 (December 9, 1973); State v. Walston, Edgecombe County Superior Ct., No. 73-Cr-7378 (December 9, 1973); State v. Albert Carey, Mecklenburg County Superior Ct., No. 73-Cr-6158 (December 11, 1973); State v. Vick, Beaufort County Superior Ct., No. 73-Cr-5687 (December 12, 1973); State v. Lampkins, Forsyth County Superior Ct., No. 73-Cr-43023 (January 19, 1974); State v. Pruitt, Cumberland County Superior Ct., Nos. 73-Cr-35545, 35546 and 35547 (January 29, 1974); State v. Williams, Wake County Superior Ct., No. 73-Cr-32521 (January 31, 1974); State v. Woods, Catawba County Superior Ct., Nos. 73-Cr-20546 and 20545 (January 28, 1974); State v. Patterson, Forsyth County Superior Ct., No. 73-Cr-22457 (February 5, 1974); State v. McCall, Transylvania County Superior Ct., Nos. 73-Cr-1828 and 1829 (February 9, 1974); State v. Avery, Bertie County Superior Ct., No. 73-Cr-2247 (February 17, 1974);

1. Prosecutorial Discretion.

In North Carolina, the Solicitor is charged with the duty to "prepare the trial dockets [and] prosecute in the name of the State all criminal actions requiring prosecution in the superior and district courts of his district," N.C. Gen. Stat. §7A-61 (1971 Cum. Supp.). He is thereby given broad and essentially unreviewable authority to initiate and terminate prosecutions, State v. Loesch, 237 N.C. 611, 75 S.E.2d 654, 656 (1953), including not only absolute discretion whether and what to charge, but also absolute discretion to bring an indicted defendant to trial upon lesser charges than those set forth in the indictment, State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971); and see State v. Roy, 233 N.C. 558, 64 S.E.2d 840 (1951). The North Carolina courts steadfastly refuse to review prosecutorial decisions. The leading case is State v. Casey, 159 N.C. 472, 74 S.E. 625 (1912), where an appellant, prosecuted and convicted for second degree murder by poisoning, argued that

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28/ cont'd.

State v. McLaughlin, Robeson County Superior Ct., Nos. 73-Cr-1802-74-Cr-228, 74-Cr-229, 74-Cr-230, 74-Cr-231, 74-Cr-232 (February 28, 1974); State v. Burns, Onslow County Superior Ct., No. 74-Cr-1012 (March 1, 1974);

there was no evidence of this crime; that she was either guilty of first degree murder or not guilty of any offense. The Court rejected this contention, commenting that "if the solicitor erred, it is an error in favor of the prisoner, of which she cannot justly complain." 74 S.E. at 625. And the majority opinion in State v. Jarrett, 284 N.C. 625, 202 S.E.2d 721, 742 (1974), flatly rejected the contention that either the Eighth or the Fourteenth Amendment required any limitation of the unfettered discretion of the Solicitor: "the Constitution of the United States does not require a state, in the enforcement of its criminal laws, so to hedge its prosecuting attorney about with 'guidelines' that he becomes a mere automaton, acting on the impulse of a computer and treating all persons accused of criminal conduct exactly alike."

Without any guidance whatsoever, then, a Solicitor is free to make the decision whether an indictment will be sought for first or second degree murder, for rape or assault to rape. He may thus "without violating [his] trust to any statutory policy . . . refuse to [seek] the death penalty no matter what the circumstances of the crime." Furman v. Georgia, supra, at 314 (Mr. Justice White concurring). This prosecutorial discretion doubtless accounts in considerable part for the striking fact, for example, that there have been only two convictions 29/ for

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29/ State v. Poole, Moore County Superior Ct. No. 73-Cr-2710 (August 17, 1973), rev'd ___ N.C. ___, 203 S.E.2d 786 (April 10, 1974). State v. Henderson, Alamance County Superior Ct., No. 73-Cr-7771 (September 5, 1973), aff'd 285 N.C. 1, 203 S.E.2d 10 (March 13, 1974), petition for cert. filed, June, 1974 (No. 73-). The petitioner in Henderson was also convicted and sentenced to die for the crime of rape.

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first degree burglary during the past year of Waddell's implementation in a State where there were about forty convictions annually for this crime in the recent past,[30] and where 39,210 "burglaries and housebreakings" were reported in 1972.[31] The conclusion is inescapable that Solicitors have simply not regarded first degree burglary as a crime deserving death, and have not initiated first degree burglary prosecutions despite clear evidence of this crime.

A recent death penalty case, where the conviction and sentence were vacated and a new trial ordered because of procedural error, illustrates the Solicitor's charging discretion under the regime of Waddell. In State v. Spicer, N.C. Sup. Ct., No. 25 (New Hanover), decided May 15, 1974, two persons were tried and convicted for murder during the course of an armed robbery.[32] A third person, one Brailford, had helped plan the

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30/ In 1955, the North Carolina Department of Justice ceased keeping separate statistics for persons convicted of First Degree Burglary and Second Degree Burglary. The Biennial Report of the Attorney General, Vol. 32 at 515, reveals that in 1952, there were 47 convictions for First Degree Burglary (with 15 "Other Dispositions" of First Degree Burglary charges); in 1953, there were 33 convictions for this crime, with 10 "Other Dispositions," ibid.; in 1954, there were 35 convictions and 26 "Other Dispositions," ibid., Vol. 33 at 377.

31/ FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE, CRIME IN THE UNITED STATES 1972 (Aug. 1973) at 74. The FBI Uniform Crime Report statistics reflect reported crimes, not convictions, and the reported "burglaries and housebreakings" are not necessarily equivalent to the total number of statutory First Degree Burglaries which occurred in the State during 1972.

32/ The conviction of Isaac Monk, also found guilty of first degree murder and sentenced to death in this incident, is pending on appeal in the North Carolina Supreme Court. Monk v. State, New Hanover County Superior Ct., No. 73-Cr-6476 (August 24, 1973).

robbery and was to share in its proceeds, but he was not charged in the murder although his testimony "permitted the jury to make a finding that he was an accomplice either in the robbery or the murder, or both." Id., slip op. at 9. The Court thus described Brailford's role in the crime:

> "[T]he State's witness Brailford made the admission to the officers, 'I stated that I initiated the proposition concerning the hit of Christian Brothers Poultry. It was my idea.' He again stated that he expected his cut . . . . The evidence discloses that the witness Brailford originated the plan to rob his employer and explained the setup at the plant."

Id., supra, at 10-11.

2. Plea Bargaining.

Under the Waddell procedures, there is no limit on the power of a Solicitor to accept a plea of guilty to a lesser included offense by a defendant charged with a capital crime, or to nol pros a capital indictment entirely. It is unclear how much plea bargaining in capital cases occurs in North Carolina,[33/] but the critical point is that it is utterly unregulated: the discretion of a Solicitor to accept a plea to a lesser offense in a capital case being quite as untrammelled as the freedom of a jury to recommend mercy in a pre-Waddell capital case. One instance of that discretion is State v. Wiggins, Bertie County Superior Ct., No. 73-Cr-2383, in which a 14 year old defendant was indicted for the rape of a nine year old girl, a potentially capital offense. On February 19, 1974, the defendant was permitted to enter a guilty plea to charges of assault with intent to rape and of assault with intent to kill, and received sentences of fifteen years and five years.

33/ Guilty pleas are said to account for up to 90% of all criminal convictions in the United States. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

Such cases doubtless reflect the long-recognized function of plea bargaining under a purportedly "mandatory" sentencing statute: it "provides the opportunity to individualize justice . . . . Certain mandatory provisions of the statutes which in a particular situation seem unduly harsh may be avoided and a punishment selected which is best suited to the defendant who has already acknowledged his guilt."[34/]

34/ Heath, "Plea Bargaining -- Justice Off the Record," 9 WASHBURN U.L. REV. 430, 455 (1970).

3. Jury Discretion

Even when a North Carolina jury has no admitted sentencing discretion, it still retains power to spare a capital defendant's life by finding him guilty of a lesser included offense. If there is any evidence to support the finding of such an offense, a defendant may demand a lesser-included-offense instruction as a matter of right.[35] N.C. Gen. Stat. §15-170 provides that:

> "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of any attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime . . . ."

35/ "If . . .there is any evidence, or if any inference can be fairly deduced therefrom, tending to show one of the lower grades of murder, it is then the duty of the trial court under appropriate instructions to submit that view to the jury." State v. Knight, 284 N.C. 384, 391, 103 S.E.2d 452, 456 (1958) (quoting State v. Spivey, 151 N. C. 676, 686, 65 S.E. 995, 999 (1909)); State v. Childress, 228 N.C. 208, 45 S.E.2d 42 (1947). If there is no evidence at all that a defendant was guilty of a lesser included offense, a defendant may not be able to demand such a charge as a matter of right, State v. Hicks, 241 N.C. 156, 84 S.E.2d 545, 547 (1954); State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971); State v. Roseman, 279 N.C. 573, 184 S.E.2d 289 (1971); State v. Griffin, 280 N.C. 142, 185 S.E.2d 149 (1971); State v. Brown, 227 N.C. 383, 42 S.E.2d 402, 404 (1947); State v. Cox, 201 N.C. 357, 160 S.E. 358, 360 (1931), and a trial judge has discretion to charge that a defendant is either guilty of the capital crime or not guilty of any crime. State v. Mays, 225 N.C. 486, 35 S.E.2d 494 (1945); State v. Scales, 242 N.C. 400, 87 S.E.2d 916 (1955); State v. Hairston, 280 N.C. 220, 185 S.E.2d 633, 642-643 (1972); State v. Beard, 207 N.C. 673, 178 S.E. 242 (1935); State v. Satterfield, 207 N.C. 118, 176 S.E. 466 (1934). However, if such a charge is given and if a defendant is convicted of the lesser included offense, the conviction will nevertheless be affirmed on appeal, even if it appears irrational on the facts of the case. See State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906), and discussion, infra.

And N.C. Gen. Stat. § 15-169 provides that:

> "[o]n the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such a finding . . . ."

The right to a lesser-included-offense charged is considered so important in North Carolina that its omission is held to be reversible error even when the defendant fails to request such a charge. State v. Wagoner, 249 N.C. 637, 107 S.E.2d 63 (1959); State v. Riera, 276 N.C. 361, 172 S.E.2d 535 (1970). See State v. Moore, 275 N.C. 198, 166 S.E.2d 652, 661 (1969); State v. DeGraffenreid, 223 N.C. 461, 27 S.E.2d 130, 132 (1943). The Supreme Court of North Carolina has frequently reversed convictions for capital offenses[36] because the trial court failed to give a charge on second degree murder,[37] voluntary

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36/ The rule in North Carolina is that "the judge's failure to submit the question of defendant's guilt of the lesser included offense is not cured by a verdict convicting the defendant of the highest offense charged in the bill," State v. Joe Freeman, 275 N.C. 662, 170 S.E.2d 461, 465 (1969).

37/ State v. Newsome, 195 N.C. 552, 143 S.E. 187 (1928); State v. Perry, 209 N.C. 604, 184 S.E. 545 (1936); State v. Gause, 227 N.C. 26, 40 S.E.2d 463 (1946); State v. Knight, 284 N.C. 384, 103 S.E.2d 452 (1958). When the State attempts to prove "Willful, deliberate and premeditated killing," N.C. Gen. Stat. § 14-17, which did not occur during the course of a felony and was not committed by poison or lying in wait, the jury may decline to return a first degree verdict and convict instead for second degree murder, since "the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first degree or second degree," N.C. Gen. Stat. § 15-172, and since "the jury alone may determine whether an intentional killing has been established where no judicial admission of the fact is made by the defendant." State v. Todd, 264 N.C. 524, 529, 142 S.E.2d 154, 158 (1965). See also, State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965); State v. Drake, 8 N.C. App. 214, 174 S.E.2d 132 (1970).

manslaughter,[38] or involuntary manslaughter[39] in first degree murder cases, or because it failed to charge on assault with intent to rape in rape cases.[40]

Moreover, a jury may be charged on a lesser included offense where there is no evidence to support such a charge, and a conviction for the lesser offense will be sustained on appeal.[41]

38/ State v. Merrick, 171 N.C. 788, 88 S.E. 501 (1916); State v. Robinson, 188 N.C. 784, 125 S.E. 617 (1924); State v. Manning, 251 N.C. 1, 110 S.E.2d 474 (1959). Cf. State v. Joe Freeman, 275 N.C. 662, 170 S.E.2d 461 (1969).

39/ State v. Wrenn, 279 N.C. 676, 185 S.E.2d 129 (1971). Cf. State v. Denny Freeman, 280 N.C. 622, 187 S.E.2d 59 (1972); State v. Joe Freeman, 275 N.C. 662, 170 S.E.2d 461, 465 (1969).

40/ State v. Williams, 185 N.C. 685, 116 S.E. 736 (1923). See also, State v. Green, 246 N.C. 717, 100 S.E.2d 52 (1957); State v. Roy, 233 N.C. 558, 64 S.E.2d 840 (1951); State v. Jones, 249 N.C. 134, 105 S.E.2d 513 (1958); State v. Webb, 20 N.C. App. 199, 200 S.E.2d 840 (1973). Cf. State v. Bryant, 280 N.C. 551, 187 S.E.2d 111, 116-118 (1972) (Bobbitt, CJ, dissenting). "An assault with intent to commit rape is a lesser degree of the felony and crime of rape. It is well settled with us that an indictment for rape includes an assault with intent to commit rape." State v. Green, 246 N.C. 717, 100 S.E.2d 52, 54 (1957).

41/ The Supreme Court of North Carolina has occasionally disapproved of this practice, State v. Bryant, 280 N.C. 551, 187 S.E.2d 111, 114 (1972); State v. Allen, 279 N.C. 115, 181 S.E.2d 453, 457 (1971); State v. Bentley, 223 N.C. 563, 27 S.E.2d 738, 741 (1943), but it has never reversed a conviction of a lesser included offense on the ground that there was no evidence to justify submitting such an offense to the jury.

State v. Robertson, 210 N.C. 266, 186 S.E. 247 (1936); State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970); State v. Bryson, 173 N.C. 803, 92 S.E. 698 (1917). In State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906), for example, the appellant, who had been convicted of second degree murder, claimed that an indictment for murder by poisoning necessarily implied that he was either guilty of first degree murder or innocent of any crime. The Court affirmed, stating that such a conviction was within the power of the jury, 55 S.E. at 343, and that "whatever the reason ing of the jury, the prisoner has no cause to complain that he was not convicted of the higher offense." 55 S.E. at 344. In State v. Quick, 150 N.C. 820, 64 S.E. 168, 170 (1909), the Court held that the giving of a manslaughter charge in a first degree murder case had been proper:

> "Suppose the court erroneously submitted to the jury a view of the case not supported by evidence whereby the jury were permitted, if they saw fit, to convict of manslaughter instead of murder, what right has the defendant to complain? It is an error prejudicial to the state, and not to him." 42/

42/ "An error on the side of mercy is not reversible . . . ." State v. Fowler, 151 N.C. 731, 66 S.E. 567 (1909). Accord: State v. Rowe, 155 N.C. 436, 71 S.E. 332, 337 (1911); See also State v. Ratcliff, 199 N.C. 9, 153 S.E. 605, 606 (1930); State v. Johnson, 218 N.C. 604, 12 S.E.2d 278, 288 (1940); State v. Vestal, 283 N.C. 249, 195 S.E.2d 297, 299-300 (1973); State v. Hall, 214 N.C. 639, 200 S.E. 375 (1939).

In State v. Bentley, 223 N.C. 563, 27 S.E.2d 738, 740 (1943), the Court declared:

> "If we are to understand the appellant to base his demand for discharge merely on the fact that the jury by an act of grace has found him guilty of a minor offense, of which there is no evidence, instead of the more serious offense charged, this is to look a gift horse in the mouth; more especially, since the conclusion that there is no evidence must be reached by conceding that all the evidence, including the admission of the defendant, points to a graver crime. Such verdicts occur now and then . . . [and] [w]hen they do, although illogical or even incongruous, since they are favorable to the accused, it is settled law that they will not be disturbed."

To insure that the jury is aware of the consequences of its decision in a capital case, the Supreme Court of North Carolina recently ruled that if "the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence . . . sufficient compelling reason exists to justify . . . informing the jury of the consequences of their possible verdicts." State v. Britt, N.C.Sup.Ct., No. 36 (Robeson), decided May 15, 1974, [Appendix D, infra] slip op. at 16. The Court also ruled that "[c]ounsel may, in his argument to the jury, in any cse, read or state to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged . . . .[He may] in his argument to the jury . . . . inform or remind the jury that the death penalty must be imposed in the event it should return a verdict of guilty upon a capital charge." Id. at 17-18. This holding implements the power of the jury to avoid imposing the death penalty in a

sympathetic case, either by convicting of a lesser included offense or by returning a verdict of not guilty.[43/] Thus, under North Carolina law, a double level of discretion may affect the jury's choice of a life or death verdict in a case where all the evidence points to guilt of a capital offense or of nothing: the trial judge has discretion to submit such lesser offenses, and the jury has discretion to commit for them.

43/ Wicker, "Christmas on the New Death Row," New York Times, Dec. 25, 1973, p. 18, col. 1:

> "Raleigh, N.C. Dec. 24 . . . In January, 1973, the North Carolina Supreme Court ruled that the Federal Supreme Court had made it unconstitutional for a jury to recommend mercy, hence life imprisonment rather than death, for an arbitrary number of those convicted of first-degree murder, arson, rape or burglary; . . . Around here, some are still heaving sighs of relief at the case of a black man charged with breaking into a house and stealing about $10 worth of food. The house was occupied, the break-in occurred at night, so the offense was first-degree burglary. Perhaps influenced by the only alternative available, the jury acquitted him, thus sparing him Christmas on the new Death Row but raising the question how mandatory death sentences can be considered an improvement on cruel and unusual punishment."

4. Executive Clemency.

The North Carolina Constitution provides that:

> [T]he Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to regulations prescribed by law relative to the manner of applying for pardons. Article III, §5(6).

Governors of the State have, by the exercise of this clemency power, spared the lives of a substantial proportion of condemned prisoners. Between 1903 and 1963, the sentences of two hundred thirty-five (235) of three hundred fifty-eight (358) condemned prisoners were commuted. The chief executive has thereby commuted 65.6 percent of the death sentences imposed in the State over a sixty year period.

The Governor's discretion to spare the lives of condemned felons is absolute. The Constitution reserves to the legislature the right to prescribe the "manner of applying for pardons" but leaves the grant or denial subject only to "such conditions as [the Governor] may think proper." Indeed, the Court of Appeals has said with regard to the analogous executive power to grant paroles (a power originally conferred upon the Governor by Article III) that:

> [i]n a matter which historically, in this State at least, has been considered a function of the executive branch and which by its nature involves a large number of intangibles, rigid guide lines are neither necessary nor desirable. Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788, 792 (1971).

Under a procedural system in which the death penalty is purportedly "mandatory," the clemency authority has commonly functioned as the aspect of the criminal justice system that responds to "mitigating factors" -- factors which, while insufficient to justify a verdict of not guilty, are nevertheless viewed by society as meriting some mercy in the exaction of punishment.[44/] A 1957 study of the imposition of capital punishment in North Carolina noted a pronounced decline in the number of commutations or death sentences after the 1947 and 1949 statutory amendments giving juries the option of imposing life sentences for the four crimes which had theretofore carried mandatory death penalties.[45/] By withdrawing that option from juries in 1973, the Waddell decision obviously displaced, but equally obviously did not reduce, the operation of discretionary selectivity in North Carolina's death-sentencing practices.

44/ Note, Executive Clemency in Capital Cases, 39 N.Y.U.L.REV. 136, 165-166 (1964).

45/ Johnson, Selective Factors in Capital Punishment, 36 SOCIAL FORCES, 165, 166-7 (1957). Behrs notes that while 64 percent of condemned persons escaped execution between 1910 and 1948, the percentage of those escaping execution dropped to 38 percent for the period between 1949 and 196?. Undoubtedly, a large proportion of condemned persons who avoided the death penalty did so by commutation. BEHRE, A BRIEF HISTORY OF CAPITAL PUNISHMENT IN NORTH CAROLINA, Tables 2 and 3. (North Carolina Office of Corrections, September 1973).

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D. The Inconsistency Of The Death Penalty With Contemporary Standards of Decency

Eighth Amendment standards are not static, and the prohibitions of the cruel-and-unusual punishment clause are not "confine[d] . . . to such penalties and punishments as were inflicted by the Stuarts." Weems v. United States, 217 U. S. 349, 372 (1910). Instead, the clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice," Id. at 378, and informed by "the light of contemporary human knowledge." Robinson v. California, 370 U. S. 660, 666 (1962). There was no disagreement among the Justices who reached the issue in Furman v. Georgia that this evolutionary standard authorized the periodic Eighth Amendment re-evaluation of hoary criminal punishments. See Furman v. Georgia, supra, at 242 (opinion of Mr. Justice Douglas); at 264-269 (opinion of Mr. Justice Brennan); at 325-328 (opinion of Mr. Justice Marshall); at 383 (opinion of Mr. Chief Justice Burger); at 409 (opinion of Mr. Justice Blackmun); at 429 (opinion of Mr. Justice Powell). Such a re-evaluation of the penalty of death is particularly appropriate at this historical juncture, for three principal reasons:

First: The cruelty and inutility of the death penalty are apparent in an age when "contemporary human knowledge," draws upon advanced medical science and sciences of human behavior. We are no longer so uninformed about the complex sources and motivations of anti-social behavior as to maintain the simplistic and beguiling notion that the threat of death deters serious crime; nor can we ignore today the the truism that government remains "the potent, the omnipresent teacher" 46/ even when it chooses to

46/ Olmstead v. United States, 277 U. S. 438, 485 (1928) Justice Brandeis, dissenting).

teach the overriding lesson of capital punishment "'that a man's life ceases to be sacred when it is thought useful to kill him.'" 47/ While we have not abandoned the essential moral and social proposition that the citizen is responsible to society for his or her conduct, new knowledge of the subtle springs of human behavior has led to a reconsideration of the justifications for retributive punishments, a partial diminution of retributive sentiment, and a guarded, but increased optimism about the possibilities of rehabilitation. 48/ At the same time, society has developed sophisticated means for safely isolating dangerous criminal offenders.

To the extent that contemporary human knowledge casts doubt on the utility of capital punishment in achieving the legitimate aims of criminal sanctions, it casts doubt on the legitimacy of capital punishment in Eighth Amendment terms. If it cannot be established that the death penalty is a superior deterrent, and if it cannot be shown that the death penalty is necessary to isolate dangerous offenders, reinforce moral standards of (if retribution

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47/ Camus, Reflections on the Guillotine, in CAMUS, RESISTANCE, REBELLION AND DEATH 173, 229 (1961).

48/ ". . . a cloud of doubt has settled over the keystone of 'retributive' theory. Its advocate can no longer speak with the old confidence that statements of the form 'This man who has broken a law, could have kept it' had a univocal or agreed meaning; or where scepticism does not attach to the meaning of this form of statement, it has shaken the confidence that we are generally able to distinguish the cases where a statement of this form is true from those where it is not." H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY (1968) at 1.

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is considered a legitimate aim of penal sanctions) a civilized society's measure of justice, then it is surely impossible for any governmental organ to justify the decision made below by a single vote of the North Carolina Supreme Court: to "extinguish, after untellable suffering, the most mysterious and wonderful thing we know, human life."[49] Mr. Justice White wrote in Furman that:

> "The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment." 408 U. S. at 312.

At a time when the death penalty is and inevitably will continue to be rarely imposed, and when empirical data fail to substantiate that its imposition is "of substantial service to criminal justice" (id. at 313) in any case, the question is squarely presented whether death as a punishment for crime is consistent with any morality that our society can forthrightly accept.

Second: The rarity with which the death penalty is imposed today signifies repudiation of its regular use. The Court in Furman confronted an accepted system which sent an exceedingly small number of persons[50]--who were, for the most part, members of

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49/ Black, Crisis in Capital Punishment, 31 MD. L. REV. 289, 291 (1971).

50/ "The most salient characteristic of capital punishment is that it is infrequently applied . . . [A]ll available data indicate that judges, juries and governors are becoming increasingly reluctant to impose or authorize the carrying out of a death sentence." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND

51/
powerless or despised minorities--to die in secret for crimes punished less severely in the vast majority of cases.

> "[T]oday society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute." Furman v. Georgia, supra, at 300 (Brennan, J. concurring).

The Furman majority rightfully looked to what the public conscience will allow the law to do, as opposed to what it will permit the law to threaten. In the words of Mr. Justice Brennan, "The objective indicator of society's view of an unusually severe punishment is what society does with it." 408 U. S. at 300 (emphasis added). A punishment which is tolerated only because it is rarely imposed, or because the facts and circumstances surrounding its imposition and the evidence of its inutility are generally unknown, or because it is imposed only upon the powerless and members of outcast groups, is not a punishment consistent with contemporary morality. Even in those states which have enacted new capital punishment legislation since Furman, the imposition of the

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50/ (Cont'd)
ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967), p. 143.
The extent to which this is true appears upon inspection of the highly reliable figures on executions maintained by the Federal Bureau of Prisons since 1930. Of the 3,859 persons executed under civil authority in the United States between 1930 and 1968, only 191 were executed during the 1960's and only 25 were executed after 1963. No one has been executed in the United States since 1967. UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 46, Capital Punishment 1930-1970 (August 1970).

51/ Justice Douglas quoted the conclusion of the President's Commission on Law Enforcement and Administration of Justice that "'the death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.'" Furman, supra, at p. 249. See also the concurring opinions of Justice Stewart, at p. 310, and Justice Marshall, at pp. 364-366. Justice Marshall noted that "American citizens know almost nothing about capital punishment." Indeed, ignorance of the details of execution is insured by law in that every American jurisdiction now

death penalty remains, and must continue to remain, a freakishly rare occurrence. Indeed, even in the State of North Carolina, where for fourteen months a purportedly "mandatory" death sentence was put into effect for four relatively common crimes, the number of death sentences was so low that it is impossible to conclude that the penalty was being in a fraction of the cases to which it was theoretically applicable. The legitimacy of its application in a manner which no honest mind can doubt will continue to be freakishly rare in this country--if it continues at all--is therefore called into question.

Third: The growing reluctance to allow the state to take the life of any human being and the absolute refusal to require or tolerate general application of the death penalty reflect not only an increased awareness of the inutility of the punishment, but also a moral development which has produced an increased respect for life and a concommittant revulsion against inflicting the physical and psychological torture of condemnation, inevitably lengthy death row confinement and execution. 52/ Increased respect for

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51/ (Cont'd)

forbids public executions. Movements to Abolish the Death Penalty in the United States, 284 ANNALS 121, 127-130 (1952).

52/ ". . . the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries." SELLIN, THE DEATH PENALTY (1959) 15.

life and increased respect for the dignity of man inevitably increase the awesomeness of the notion of condemnation and execution. Thus executions, which were once routine occurrences, had ceased for a period of five years even prior to Furman as this nation agonized over the prospect of their resumption and over the inevitable and sobering possibility that human error or a denial of due process could send a man to his death. 53/

The enormity of the process forbids its resumption without the prior judgment of this Court. If, after a lapse of seven years, the United States is going to return to killing people, this Court should first consider under the relevant Eighth Amendment standards all that that implies.

It is incontrovertible that an impending execution inflicts severe psychological anguish and mental pain upon a condemned man. Under a legal system which postpones execution for periods measured in years in an attempt to assure its conformity with due process of law, the wait between the imposition of sentence and the actual infliction of death exacts a severe toll.

As the California Supreme Court has pointed out, "the process of carrying out a verdict of death is of such so degrading and brutalizing to the human spirit as to constitute psychological torture." People v. Anderson, 6 Cal.3d 628, 493 P.2d 880, 894 (1972).

53/ See Black, "The Crisis in Capital Punishment" 31 MD. L. REV. 290, at 295-300 (1971).

[40b]

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The condemned prisoner, even more than the expatriate, is subjected to the "fate of ever-increasing fear and distress." Trop v. Dulles, 356 U. S. 86, 102 (1958) (plurality opinion of Chief Justice Warren). The stress of awaiting execution frequently produces insanity, see Solesbee v. Balkom, 339 U. S. 9, 14 (1950) (Justice Frankfurter, dissenting), or other extreme manifestations of psychological compensation.

Moreover, existing data suggests what imagination intuits: there is likely to be unmeasurable physical pain before consciousness is lost. "Although our information is inconclusive, it appears that there is no method available that guarantees an immediate and painless death." Furman v. Georgia, supra, at 287 (Mr. Justice Brennan concurring).

And there is, finally the enormity and irreversibility of the act of condemning and terminating a human existence -- an act which denies absolutely the very thing which the Eighth Amendment was created to protect: the dignity of man.

The moral development which has accompanied advances in understanding of the causes and control of crime and which is reflected in the increasing world-wide disinclination to impose the punishment of death calls upon this Court now to consider the question of the legitimacy of that punishment under the Eighth Amendment's measure: "the evolving standards of decency that mark the progress of a maturing society."[54/]

54/ Trop v. Dulles, 356 U. S. 86, 100 (1958) (plurality opinion of Chief Justice Warren).